FILED

No. 961092 JAN 7 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

BRYAN H. CRAWFORD and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS; ISG COMMUNICATIONS, INC., a California corporation; BOLD TYPE, INC., a California corporation; WAYNE C. BERRY, doing business as ZAP DISTRIBUTORS; and LISA LASCODY,

Petitioners,

v.

DANIEL E. LUNGREN, individually and as Attorney General of the State of California; JAMES KENNETH HAHN, individually and as City Attorney for the City of Los Angeles; CHIEF WILLIE WILLIAMS, individually and as Police Chief for the City of Los Angeles; GILBERT GARCETTI, individually and as District Attorney of the County of Los Angeles; THOMAS W. SNEDDON, JR., individually and as District Attorney for the County of Santa Barbara; MICHAEL D. BRADBURY, individually and as District Attorney for the County of Ventura,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STANLEY FLEISHMAN
Counsel of Record
DAVID GROSZ
BARRY A. FISHER
FLEISHMAN, FISHER & MOEST
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

106 pp

QUESTIONS PRESENTED

1. Whether, on its face and as applied, California Penal Code section 313.1(c)(2) – a content-based law effectively banning the distribution of non-obscene constitutionally protected publications through newsracks on public streets in order to shield minors from those publications – violates the Free Speech provision of the First and Fourteenth Amendments because:

a. the State provided no evidence, either in the legislative record or in the trial court, that the statute either promotes a compelling interest or constitutes the least restrictive means to achieve that interest, and it was justified by the court of appeals based solely on the court's own instinct and experience;

b. the elimination of newsrack distribution on protected speech has the effect of limiting the content of adult communications to that which is suitable for children.

2. Whether the court of appeals' ruling that the First Amendment permits the banning of newsrack distribution of protected speech because adults may purchase the materials in alternative ways is in direct conflict with *Schneider v. State*, 308 U.S. 147 (1939).

PARTIES TO THE PROCEEDING AND RULE 29.6 INFORMATION

The caption of the case contains the names of all the parties to the proceeding. There is no parent or subsidiary company to be listed pursuant to Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 INFORMATION ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The parties 4

B. The district court proceedings 5

C. The Ninth Circuit's decision 10

REASONS FOR GRANTING THE WRIT 13

1. THE CASE PRESENTS IMPORTANT AND SUBSTANTIAL QUESTIONS SIMILAR TO THOSE INVOLVED IN THE PENDING CASE OF *RENO V. AMERICAN CIVIL LIBERTIES UNION*, NO. 95-511 13

2. THE COURT OF APPEALS' HOLDING THAT SECTION 313.1(c)(2), A CONCEDEDLY CONTENT-BASED LAW, SATISFIES THE STRICT SCRUTINY TEST DESPITE THE STATE'S FAILURE TO PROVIDE ANY EVIDENCE EITHER IN THE LEGISLATIVE RECORD OR IN THE TRIAL COURT IS IN DIRECT CONFLICT WITH THIS COURT'S JURISPRUDENCE 14

TABLE OF CONTENTS – Continued

Page

a. The court of appeals committed constitutional error in relying on its instinct and experience as a substitute for evidence produced by the State to justify the abridgment of speech..... 16

b. The court of appeals committed constitutional error in supplying a "compelling state interest" that was neither articulated nor defended by the State..... 18

c. The court of appeals committed constitutional error in upholding a total ban on newsrack distribution of protected speech when less restrictive means are available..... 19

i. A prohibition on minors' purchase and a warning label would be less restrictive..... 20

ii. A geographic limitation would be less restrictive..... 20

3. THE STATUTE EFFECTIVELY LIMITS THE CONTENT OF ADULT COMMUNICATIONS TO THAT WHICH IS SUITABLE FOR CHILDREN..... 21

4. THE COURTS BELOW COMMITTED CONSTITUTIONAL ERROR IN HOLDING THAT THE FIRST AMENDMENT PERMITS THE BANNING OF NEWSRACK DISTRIBUTION OF PROTECTED SPEECH ON THE THEORY THAT ADULTS MAY OBTAIN THE MATERIAL IN ALTERNATIVE WAYS..... 27

CONCLUSION 29

TABLE OF CONTENTS – Continued

Page

APPENDIX

A. Opinion of the Court of Appeals .....App. 1

B. Judgment of the District Court .....App. 22

C. Findings of Fact and Conclusions of Law of the District Court .....App. 24

D. Order Granting Preliminary Injunction ...App. 35

E. Findings of Fact and Conclusions of Law of the District Court Granting Preliminary Injunction .....App. 37

F. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc .....App. 54

G. California Penal Code, Part 1, Title 9, Chapter 7.6 (excerpts) .....App. 56

H. Order Granting Motion for Stay of Issuance of the Mandate Pending Application of Writ of Certiorari.....App. 60

I. Order of the Court of Appeals Staying Enforcement of the Statute Pending Appeal.....App. 62

J. Partial Transcript of Oral Argument of Deputy Attorney General Foley.....App. 63

TABLE OF AUTHORITIES

Page

CASES

American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996) (No. 96-511) 26

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 24

Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *reinstated on remand*, Nos. 94-1431, 94-1432, 1996 WL 657711 (4th Cir. Nov. 13, 1996) 20

Board of Trustees of the State University v. Fox, 492 U.S. 469 (1989) 15

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 15, 22, 23, 27

Butler v. Michigan, 352 U.S. 380 (1957).... 15, 22, 24, 25

Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988)..... 26

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 24, 28

City of Houston v. Hill, 482 U.S. 451 (1985) 25

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 9, 10

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2874 (1996)... 12, 15, 17, 24

Desert Outdoor Advertising, Inc. v. City of Moreno Valley, Nos. 95-55529, 95-55531, 1996 WL 729592 (9th Cir. Dec. 20, 1996) 11

Edenfield v. Fane, 507 U.S. 761 (1993) 15, 17

TABLE OF AUTHORITIES – Continued

Page

Elrod v. Burns, 427 U.S. 347 (1976) 15

FCC v. Pacifica Foundation, 438 U.S. 726 (1978)....22, 23

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 25

44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) 16, 17, 21

Frisby v. Schultz, 485 U.S. 476 (1988) 24

Ginsberg v. New York, 390 U.S. 629 (1968).....10, 22

International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992)..... 24

Massachusetts v. Oaks, 491 U.S. 576 (1989) 12

McGautha v. California, 402 U.S. 183 (1971) 12

New York v. Ferber, 458 U.S. 747 (1982) 10, 22

Penn Advertising, Inc. v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom. Penn Advertising, Inc. v. Schmoke*, 116 S. Ct. 2575 (1996), *reinstated on remand*, No. 94-2141, 1996 WL 657723 (4th Cir. Nov. 13, 1996) 20

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)..... 15

Reno v. American Civil Liberties Union, 117 S. Ct. 554 (1996) 13

Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 16, 17

Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 9, 17, 21, 23, 24, 25

Schneider v. State, 308 U.S. 147 (1939) 27

TABLE OF AUTHORITIES – Continued

Page

Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *juris. statement filed*, 65 U.S.L.W. 2095 (U.S. Oct. 15, 1996) (No. 96-595) 26

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S. Ct. 2445 (1994) 15, 17, 19

Virginia v. American Booksellers Association, 484 U.S. 383 (1988) 15, 25

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 9

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1343(a)(3), (4) 5

Cal. Penal Code § 313.1(c)(2) ..... *passim*

Cal. Penal Code § 313.1(h) 3

Cal. Penal Code § 313.1(h)(1) 4

Cal. Penal Code § 313.1(h)(2) 25

1994 Cal. Stat. ch. 38, § 1 5

RULES

Sup. Ct. R. 29.6 ii

PETITION FOR WRIT OF CERTIORARI

Bryan H. Crawford and Jim Atwell, a partnership doing business as Advanced Publications; ISG Communications, Inc., a California corporation; Bold Type, Inc., a California corporation; Wayne C. Berry, doing business as Zap Distributors; and Lisa Lascody, respectfully petition the Court to issue a writ of certiorari to review the September 11, 1996, judgment of the United States Court of Appeals for the Ninth Circuit holding that California Penal Code section 313.1(c)(2), on its face and as applied, does not violate the Free Speech provision of the First and Fourteenth Amendments to the United States Constitution.

OPINIONS BELOW

The opinion of the court of appeals is reported at 96 F.3d 380 and is included as Appendix A. (App. 1.)[1] The judgment of the district court upholding the statute is included as Appendix B. (App. 22.) The district court's findings of fact and conclusions of law supporting its judgment are included as Appendix C. (App. 24.) The district court's order granting a preliminary injunction is included as Appendix D. (App. 35.) The district court's findings of fact and conclusions of law supporting the preliminary injunction are included as Appendix E. (App. 37.) The court of appeals' order denying the petition for rehearing and rejecting the suggestion for rehearing en banc is included as Appendix F. (App. 54.) The court of

[1] The Appendix to this Petition is cited as App. [page].

appeals' order granting Petitioners' motion for stay of issuance of the mandate pending application for a writ of certiorari is included as Appendix H. (App. 60.) The court of appeals' order granting Petitioners' motion for a stay of the district court's October 20, 1995, order pending appeal is included as Appendix I. (App. 62.) Apart from the court of appeals' opinion (Appendix A), none of the foregoing matters is reported.

STATEMENT OF JURISDICTION

The opinion and judgment of the court of appeals were entered on September 11, 1996. Rehearing was denied on November 29, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . . "

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty or property, without due process of law. . . . "

3. California Penal Code section 313.1(c)(2) provides:

> Any person who knowingly displays, sells, or offers to sell in any coin-operated vending machine that is not supervised by an adult and that is located in a public place, other than a public place from which minors are excluded, any harmful matter, as defined in subdivision (a) of Section 313, shall be punished as specified in Section 313.4.

4. Other statutory provisions involved are included as Appendix G. (App. 56.)

STATEMENT OF THE CASE

This case involves a constitutional challenge to California Penal Code section 313.1(c)(2), which prohibits Petitioners from selling non-obscene publications through newsracks on public streets, unless the newsrack is supervised by an adult.

It is conceded by all that section 313.1(c)(2) standing alone works a total ban on newsrack sales of "adult" publications. The State stipulated and the district court found that it would not be feasible to have an adult supervise the newsracks because, for example, it would cost Zap Distributors $5,805,000 a year to supervise its 135 newsracks. (App. 26-27.)

Section 313.1(h)[2] contains two affirmative defenses, to liability under section 313.1(c)(2). The record is plain that there is no feasible way to comply with either defense; the district court expressly found that it was not

[2] Section 313.1(h) is set forth at App. 58.

feasible to comply with section 313.1(h)(1). (App. 27.) At trial, Petitioners presented evidence that there was no feasible way to comply with section 313.1(h)(2).

Respondents produced no evidence that there is a feasible way of complying with either of the "defenses," and they do not seriously contend that there is any realistic way Petitioners can distribute their publications through newsracks on public streets without violating the challenged statute.

A. The parties.

Petitioners Bryan H. Crawford and Jim Atwell, a partnership doing business as Advanced Publications; ISG Communications, Inc.; and Bold Type, Inc. publish "adult" newspapers (i.e., material Respondents deem "harmful to minors") that they distribute through newsracks. Petitioner Wayne C. Berry, doing business as Zap Distributors, owns newsracks from which he distributes adult publications, including, but not limited to, those published by Advanced Publications, ISG Communications, and Bold Type, Inc.[3]

Respondents are Daniel E. Lungren, the Attorney General of the State of California; James Kenneth Hahn, the City Attorney for the City of Los Angeles; Gilbert Garcetti, the District Attorney for the County of Los

---

[3] Petitioner Lisa Lascody is an adult who purchases adult newspapers from newsracks and wishes to continue to do so. Because Lascody is not a publisher or distributor, to avoid confusion, Petitioners exclude Lascody when they refer generally to the impact of the statute on Petitioners.

Angeles; Willie Williams, the Chief of the Los Angeles Police Department; Thomas W. Sneddon, Jr., the District Attorney for the County of Santa Barbara; and Michael D. Bradbury, the District Attorney for the County of Ventura. These public officials are charged with enforcement of the challenged statute.

B. The district court proceedings.

1. Enacted in 1994, 1994 Cal. Stat. ch. 38, § 1, section 313.1(c)(2) was to have become effective on January 1, 1995. Shortly before that date, Petitioners filed an action in the United States District Court for the Central District of California seeking injunctive and declaratory relief. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343(a)(3), (4). On December 19, 1994, the district court granted a temporary restraining order against enforcement of the statute and an order to show cause why a preliminary injunction should not issue.

2. After submission of evidence and extensive briefing, the district court, on January 6, 1995, filed a preliminary injunction restraining the Respondents from enforcing the statute. (App. 35-36.) The court stated:

> It is likely that California Penal Code section 313.1 is facially invalid because it restricts the distribution of protected speech based on the content of that speech; because California has failed to establish that the new law achieves a compelling government interest and achieves such an interest by the least restrictive means;

> and because the "defenses" set out in section 313.1(h) appear to be a sham.

(App. 52.)

The court made extensive findings of fact and conclusions of law. It found that the "statute would likely effectively ban from newsracks in California publications fully protected by the First Amendment and substantially impede the distribution of such publications," (App. 48); that the statute "is a content-based regulation on the exercise of free speech enacted without an apparent demonstrated compelling state interest," (App. 48-49); that "it appears that other, less restrictive methods exist to achieve California's articulated goal," (App. 49); that the newspapers published and distributed by Petitioners are not obscene and they are therefore fully protected by the First Amendment, (App. 49); that the statute "is content based," and "is presumptively unconstitutional," (App. 50); that "First Amendment protections are applicable to the public distribution of newspapers and periodicals through newsracks," which are "effective and important means of distribution," (App. 50); that "[t]he statute regulates speech in public streets and highways, a quintessential public forum . . . and is, therefore, 'subject to the highest scrutiny,' " (App. 51); that "[t]he . . . statute is not a time, place and manner restriction since it is content based," (App. 51); that "it is likely that [the statute] is facially invalid because it restricts the distribution of protected speech based on the content of that speech," and because "California has failed to establish that the new law achieves a compelling government interest and achieves such an interest by the least restrictive means," (App. 52).

3. The matter came on for trial on September 8, 1995, mostly on stipulated facts. In its judgment and findings and conclusions filed October 20, 1995, the district court reversed itself and upheld the statute.

In accordance with the stipulations, the district court found that Advanced Publications and ISG Communications publish adult newspapers, that they do not own any newsracks, and that virtually all of their newspapers are sold through newsracks, (App. 24-25); that Advanced Publications, ISG Communications, and Bold Type design their papers so that when they are in the newsracks no "harmful matter" is visible, (App. 25-26); that Bold Type's publication *Spectator* is a weekly tabloid news magazine containing news items, book and video reviews, photo feature articles, political and social commentary and advertisements, and that about half of its papers sold are through newsracks with the balance sold through stores and subscriptions, (App. 26); that Zap Distributors has been disseminating "alternative" or "counterculture" newspapers through sidewalk newsracks for over 17 years and that it would cost Zap $5,805,000 a year to supervise its newsracks as required by section 313.1(c)(2), (App. 26); that vending machines that utilize authorized access or identification cards cost more than $900 each and are not suitable for street use because of the threat of vandalism, (App. 27); that, despite Advanced Publications' repeated efforts to expand the distribution of newspapers it presently distributes in newsracks into retail outlets, very few of such outlets are interested in selling those newspapers, and it therefore appears that very few retail outlets would be interested in selling tokens, (App. 27); that the ultimate effect of the law is to interfere

substantially with the ability of adults to buy the newspapers distributed by Zap and published by Advanced Publications, ISG Communications, and Bold Type from newsracks, (App. 27); that the effect of the law will be to substantially burden the sale of the newspapers distributed by Zap and published by Advanced Publications, ISG Communications, and Bold Type through newsracks on public thoroughfares, (App. 27); that non-obscene sexually explicit material, or "harmful matter," is freely available in libraries, book stores, news stands, music stores, and pay-per-view television, (App. 28); that the distribution of Petitioners' publications through newsracks is presently subject to regulation by laws other than section 313.1(c)(2) and the newspapers in the newsracks do not display to public view sexually explicit material, (App. 28); and that the legislature made *no formal official study concerning the extent to which minors purchased adult material from vending machines, nor the harm, if any, to minors flowing from adult publications being sold in vending machines,* and the legislature made *no findings justifying the legislation,* (App. 30) (emphasis added).

The district court also found that reasonable alternative means of communication other than newsracks exist for Petitioners to distribute the publications including all means of communication except unattended newsracks in public streets, (App. 31); that any unwillingness of retailers to handle Petitioners' publications is not attributable to the statute, (App. 31); that Petitioners have not proven that they are unable to distribute their publications by means other than newsracks, (App. 31); that Petitioners have not proven that they would be unable to

adapt their newsracks to comply with the statute, (App. 31); that Petitioners have not proven an interest other than a commercial interest in increased profits from distributing their publications by means of newsracks, as opposed to alternative means of distribution, (App. 31); that unattended newsracks expose minors to whatever materials are distributed therein, because anyone with the requisite coins to open an unattended newsrack can remove its contents, (App. 32); and that geographical or territorial limitations on the placement of newsracks distributing harmful matter would not be effective in preventing minors from being exposed to the publications so distributed, (App. 32).

4. When the district court issued its preliminary injunction restraining enforcement of section 313.1(c)(2), it ruled that the statute is a content-based regulation subject to strict scrutiny. (App. 50-51.) Ultimately, it concluded the opposite – that the statute is a content-neutral regulation similar to the adult zoning ordinances involved in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). (App. 32.) The court held that the statute was valid because, as in the law involved in *Renton*, reasonable alternative means of communication were available to Petitioners to distribute their publications. (App. 33.)

Alternatively, the court held that, even if the statute was content-based, it also passes constitutional muster under the test set forth in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989). (App. 33.) Although it had found as facts that the legislature had made no findings justifying the legislation, and that it had made no study

concerning the extent to which minors purchased adult materials from newsracks, (App. 30), the court stated that this "does not tend to invalidate the statute because the governmental interest has been previously recognized in the *Ginsberg*, *Ferber*, and other decisions, and the purpose of the statute is apparent on its face." (App. 33.) "[E]ven if the statute causes harmful matter to be distributed from newsracks no longer," the district court stated, "[t]he interest burdened by the statute does not rise above a commercial interest in profits on the part of the distributors and inconvenience on the part of the consumers, neither of which is sufficient to outweigh the harm to society caused by the distribution of statutorily defined harmful matter from unattended newsracks." (App. 33.) The district court also found that Petitioners "have not proven that they would be unable to adapt their newsracks to comply with the statute." (App. 31.)

Accordingly, the court entered judgment declaring that Penal Code section 313.1(c)(2) violates "no provision in the Constitution either on its face or as applied to plaintiffs." (App. 22.)

C. The Ninth Circuit's decision.

The court of appeals affirmed the district court's judgment. It disagreed, however, with the district court's conclusion that the statute is a content-neutral regulation, like the adult zoning ordinance in *Renton*. Rather, the court held the statute is content based and thus presumptively unconstitutional. (App. 11.)

The court purported to apply this Court's strict scrutiny test but, as Judge Tashima, concurring, acknowledged, the court's opinion is "contrary to the teaching of all conventional wisdom on the scope of judicial review," in "the sensitive area of First Amendment strict scrutiny." (App. 20-21.) The court's opinion is more than contrary to conventional wisdom: it is fatally flawed.

The court held that the statute met the strict scrutiny test, despite the absence of any evidence in the record justifying the legislation, asserting that such evidence is not necessary. (App. 12.)[4] Courts, the majority stated, can rely on the common sense of judges when it becomes necessary to consider whether a state has demonstrated that it has a compelling interest in restricting speech and that it has done so in the least restrictive manner available to achieve its interest. (App. 12-13.) Judge Tashima stated the court's position more plainly, observing that its judgment "that no less restrictive means is available to achieve [the State's] compelling interest, despite the absence of any evidence in the record to support that 'finding' is truly instinctive and experiential." (App. 21.)

Under this Court's jurisprudence, however, the Ninth Circuit's ruling is plainly erroneous because "responses

---

[4] On December 20, 1996, a different panel of the court found a billboard ordinance violative of the First Amendment because the City failed to meet its "burden of affirmatively establishing that the ordinance" implements a substantial government interest; directly advances that interest; and reaches no further than necessary to accomplish the given objective. *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, Nos. 95-55529, 95-55531, 1996 WL 729592, at *4 (9th Cir. Dec. 20, 1996).

of this sort, like guesses about the comparative seriousness of the problem, are not legally adequate." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2394 (1996).

Judge Tashima's admonition to legislatures that they "should be mindful that they ought not be content . . . to rely on the instinct and experience of judges [to substitute for] the absence of any legislative record," highlights another problem with the court's decision. A legislature that cannot count on a court to use nothing more than its own instinct and experience to defend the enactment it is reviewing might be motivated to ventilate more fully the considerations underlying its law abridging speech. *See McGautha v. California*, 402 U.S. 183, 265 (1971) (Brennan, J., joined by Douglas & Marshall, JJ., dissenting) ("[T]he protection against arbitrary and discriminatory action . . . requires that state power be exerted only through mechanisms that assure that fundamental choices among competing state policies be explicitly made by some responsible organ of the state."); *Massachusetts v. Oaks*, 491 U.S. 576, 586 (1989) (opinion of Scalia, J., speaking for the Court on this point) ("The overbreadth doctrine serves to protect constitutionally legitimate speech, not merely *ex post*, that is after the offending statute is enacted, but also *ex ante*, that is when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free . . . legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.").

REASONS FOR GRANTING THE WRIT

1. THE CASE PRESENTS IMPORTANT AND SUBSTANTIAL QUESTIONS SIMILAR TO THOSE INVOLVED IN THE PENDING CASE OF *RENO V. AMERICAN CIVIL LIBERTIES UNION*, NO. 95-511.

On December 6, 1996, the Court noted probable jurisdiction in *Reno v. American Civil Liberties Union*, 117 S. Ct. 554 (1996) (No. 95-511.) The third question presented in the jurisdictional statement in *Reno* is whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to "display in a manner available to a person under 18 years of age," any material "that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," is unconstitutional on its face. In this case, the main question is whether the California criminal prohibition providing that any person who knowingly displays, sells, or offers to sell "harmful matter" in any coin-operated newsrack located on a public street, that is not supervised by an adult, is unconstitutional.

In *Reno*, there is a dispute as to whether the Communications Decency Act substantially interferes with the First Amendment right of adults in order to shield minors from strong sexual material. The Government acknowledges that such an interference would raise "difficult questions." Jurisdictional Statement at 21, *Reno; id.* at 25 ("An infirmity in section 223(d)(1)(B)'s prohibition against the display of patently offensive material should not affect the other two primary provisions, which contain distinct prohibitions against the knowing initiation

of communication or transmission of such material to children under age 18."). In the case at bar, it is conceded that section 313.1(c)(2) *does* substantially interfere with the First Amendment right of adults, (App. 27), and the statute *does not* contain distinct prohibitions against knowingly distributing "adult" material to minors.

The courts below recognized that this case presents important and substantial questions. Before the statute became effective, the district court issued a temporary restraining order, and then a preliminary injunction, (App. 35-36). After the district court upheld the statute, it stayed the statute's enforcement to enable Petitioners to seek a further stay in the court of appeals, (App. 22), and a stay pending appeal was granted, (App. 62). Finally, the court of appeals granted Petitioners' motion for a stay of issuance of mandate pending application for a writ of certiorari. (App. 60-61.)

2. THE COURT OF APPEALS' HOLDING THAT SECTION 313.1(c)(2), A CONCEDEDLY CONTENT-BASED LAW, SATISFIES THE STRICT SCRUTINY TEST DESPITE THE STATE'S FAILURE TO PROVIDE ANY EVIDENCE EITHER IN THE LEGISLATIVE RECORD OR IN THE TRIAL COURT IS IN DIRECT CONFLICT WITH THIS COURT'S JURISPRUDENCE.

Contrary to the court of appeals' ruling, section 313.1(c)(2) does not pass strict scrutiny's exacting test. Under that test, "[i]t is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then

the law must restrict as little speech as possible to serve the goal." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 2478 (1994) (O'Connor, J., joined by Scalia & Ginsburg, JJ., concurring in part and dissenting in part). Moreover, as the party seeking to regulate protected speech, the government has the burden of affirmatively proving its case. *Board of Trustees of the State Univ. v. Fox*, 492 U.S. 469, 480 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 70 n.20 (1983) ("Parties seeking to uphold a restriction on . . . speech carry the burden of justifying it."); *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). These commercial speech cases apply with greater force to a content-based law abridging pure speech, since such statutes are presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Additionally, government may not impose a total ban on an important medium of communication. *See, e.g., Denver Area Educ. Telecomms. Consortium v. FCC* , 116 S. Ct. 2374, 2423 (1996) (Thomas, J., joined by Rehnquist, C.J. & Scalia, J., concurring in the judgment in part and dissenting in part) ("Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming [on cable]").

Finally, where the governmental interest is merely to shield minors from constitutionally protected "adult" material not thrust upon them, government may not regulate in a manner that substantially burdens the First Amendment rights of adults. *Butler v. Michigan* 352 U.S. 380 (1957); *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988); *see generally Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion) ("The benefit gained [by a

content-based restriction] must out-weigh the loss of constitutionally protected rights.").

a. The court of appeals committed constitutional error in relying on its instinct and experience as a substitute for evidence produced by the State to justify the abridgment of speech.

The court of appeals acknowledged that the absence of any evidence, either before the legislature or otherwise in the record, made it more difficult for it properly to apply the strict scrutiny test. It concluded, however, that such evidence is not necessary. (App. 12.) "[E]ven in the absence of findings or specific evidence," the court stated, "courts can and will rely on common sense, other statutes, and other cases" when it becomes time to apply the strict scrutiny test. (App. 12-13.) The court acknowledged, (App. 13), that, in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), and *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), this Court had held that, "in the commercial speech area, the State bears the burden of showing that the regulation will advance its interest materially." The court of appeals failed to note, however, that *Rubin* added that the burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree." 115 S. Ct. at 1592 (citation and inner quotation omitted).

The court of appeals also noted that, in *Denver Area*, this Court had asked a number of questions testing the breadth of the statute there at issue. It concluded that "[t]he Court did not hold that the mere asking of the questions was enough to overturn the statute, but it did go on to strike the statutory provision because 'the answers to the question are not obvious.' " (App. 13-14). The *Denver Area* Court did make clear, however, that "guesses about the comparative seriousness of the problem are not legally adequate." 116 S. Ct. at 2394.

Additionally, the court of appeals stated that, in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1992), this "Court did refer to Congressional findings and found that the findings did not support the statute." (App. 14). But, quoting Justice Scalia's concurring opinion in *Sable*, 492 U.S. at 133, the court of appeals asserted that "neither due process nor the First Amendment requires legislation to be supported by committee reports, floor reports or even consideration. . . . " (App. 14).

Putting aside the fact that Justice Scalia was not speaking for the Court, it has been clear at least since *Edenfield v. Fane*, that, in the field of commercial speech, the party seeking to regulate speech has the burden of affirmatively establishing that the regulation implements a substantial government interest; directly advances that interest; and reaches no further than necessary to accomplish the given objective. *See, e.g., 44 Liquormart*; *Rubin v. Coors Brewing*. It follows, a fortiori, that a case involving a content-based regulation of pure speech, the party seeking to regulate the speech has at least as heavy a burden. *See Denver Area*, 116 S. Ct. at 2394 (opinion of the Court);

Turner Broadcasting, 114 S. Ct. at 2472 (Kennedy, J., joined by Rehnquist, C.J., & Blackmun & Souter, JJ.).

b. The court of appeals committed constitutional error in supplying a "compelling state interest" that was neither articulated nor defended by the State.

The court of appeals assumed – erroneously – that the State's compelling interest was the protection of minors from the "psychological damage" associated with their obtaining and reading "adult" publications, stating that the statute focuses "on the direct impact of the speech" on minors and "is designed to prevent the materials from provoking harmful reactions in minor readers." (App. 9-10.)

In its oral argument in the court of appeals, however, the State denied that this was its compelling interest. In response to questions from the court, the State asserted that it did not matter that there is no indication that minors purchase the newspapers from newsracks because "[i]t is not the purchase of the materials by children [that] is the evil . . . being addressed," (App. 63); that the statute would serve a compelling State interest even if no minor ever has or ever would purchase the publications from newsracks, (App. 64); that the statute is justified even if minors buy 10 publications out of a total sale of 20,000, (App. 66); that minors suffer no psychological harm from looking at the newsracks, (App. 67); that the State does not have to make any showing that minors actually purchase adult material from newsracks, (App. 52); and that the compelling State interest is to protect the minor from

making a decision of whether or not to purchase the material, (App. 68).

In the absence of evidence that minors purchase the publications from newsracks, there is no compelling need to ban newsrack sales since no "harmful matter" is exposed, (App. 63), and the State concedes that "no psychological harm comes from looking at the newsrack," (App. 67-68).

The mere statement that the State's interest is compelling in the abstract, this Court has recognized, is not enough. The State "must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate the harms in a direct and material way." *Turner Broadcasting*, 114 S. Ct. at 2470 (Kennedy J., joined by Rehnquist, C.J., & Blackmun & Souter, JJ.).

c. The court of appeals committed constitutional error in upholding a total ban on newsrack distribution of protected speech when less restrictive means are available.

It is conceded by all that the State produced no evidence that it used the least restrictive means of achieving its goals, and the court of appeals' judgment that no less restrictive means is available to achieve the State's compelling interest is based on nothing but the court's instinct and experience. One reason such an approach is constitutionally unacceptable is that it often leads to error, as it did in this case. Contrary to the court of

appeals' instinct and experience, there are less restrictive alternatives available.

i. A prohibition on minors' purchase and a warning label would be less restrictive.

California could directly prohibit a minor from buying "harmful matter" from a newsrack, and require newsrack operators to post a label on the newsracks informing minors that it is unlawful for them to purchase the publications in the newsrack. California stipulated that some kind of warning label is customarily used to shield minors from purchasing adult material by mail. (App. 29.) Warning labels, the court of appeals stated, might deter some children, but would not deter the bulk of them. (App. 16.) But that is simply the type of speculation and conjecture that this Court has regularly condemned.

ii. A geographic limitation would be less restrictive.

The court of appeals, relying on its instinct and experience, stated that placing newsracks away from schools "would at best force children to go somewhat out of their way to obtain illicit material." (App. 17.) The court's instinct is at variance with *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *reinstated on remand*, Nos. 94-1431, 94-1432, 1996 WL 657711 (4th Cir. Nov. 13, 1996), and *Penn Advertising, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom. Penn Advertising, Inc. v. Schmoke*, 116 S. Ct. 2575 (1996), *reinstated on*

remand, No. 94-2141, 1996 WL 657723 (4th Cir. Nov. 13, 1996). In those cases, the Fourth Circuit upheld restrictions on billboard advertising for liquor and tobacco. The regulations prohibited the billboards in "locations where children generally walk and play," and permitted them in commercially and industrially zoned areas. On the advertisers' petitions for certiorari claiming that the government had not justified its restriction on speech, this Court vacated and remanded for further consideration in light of *44 Liquormart*. While the Fourth Circuit reinstated the judgments on remand, this Court has not yet decided whether even these *geographic* restrictions on *commercial* speech violate the First Amendment. At a minimum, the cases are in conflict with the court of appeals' assertion here that geographic limitations are *always* entirely inefficacious. (App. 17.)

3. THE STATUTE EFFECTIVELY LIMITS THE CONTENT OF ADULT COMUNICATIONS TO THAT WHICH IS SUITABLE FOR CHILDREN.

The statute violates the First Amendment because it effectively bans newsrack sales of protected speech and interferes with adult-to-adult communication in a substantial manner. The Court has repeatedly held that government may not ban "indecent" speech between adults in order to advance its interest in protecting minors from such speech that is not thrust upon them. The same is true with regard to "harmful" speech. This is so because "government may not reduce the adult population to . . . only what is fit for children." *Sable Communications*, 492 U.S. at 128 (citations and inner quotation omitted). "The level of discourse reaching a mailbox simply cannot

be limited to that which would be suitable for a sandbox," and this is so "regardless of the strength of the government's interest" in protecting children. *Bolger v. Youngs Drug*, 463 U.S. at 74-75. Government may not constitutionally "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence. . . . Surely this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Sable*, the Court cited *Butler* to "reiterate" that point, and stressed that a statute is unconstitutional if it has the "effect of limiting the content of adult [communications] to that which is suitable for children. . . . " 492 U.S. at 131.

While the Court has upheld laws designed to shield minors from sexually explicit material, it has never (except in the broadcast context presented in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)) upheld such a statute that interferes with adult-to-adult communication in a substantial manner. The statute involved in *Ginsberg v. New York*, 390 U.S. 629 (1968), banned only the knowing distribution of adult material to minors. The statute did not impinge in any way on the right of adults to obtain the material. *New York v. Ferber*, 458 U.S. 747 (1982), involved the constitutionality of a statute that prohibited persons from knowingly promoting sexual performances by children under 16 and distributing material depicting such performances. This "child pornography," the Court held, was not protected by the First Amendment. Accordingly, *Ferber* did not substantially interfere with the First Amendment right of adults.

Pacifica Foundation rested in large measure on the proposition that government may regulate *broadcasts* consistent with the Constitution, even though the same regulation would run afoul of the First Amendment in the print medium. 438 U.S. at 748. This is so because broadcasting has a "uniquely pervasive presence in the lives of all Americans," and "is uniquely accessible to children, even those too young to read." *Id.*

The Court has repeatedly instructed against overreaching the rationale of *Pacifica*'s holding. First, in *Bolger*, the Court refused to extend *Pacifica* to a federal law that prohibited the unsolicited mailing of advertisements for contraceptives. 463 U.S. at 61. The Court rejected the Government's argument that the regulation was required to protect children, stating that its "decisions have recognized that the special interest of . . . regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." 463 U.S. at 74 (citations and footnotes omitted).

In *Sable*, the Court again limited *Pacifica*. In that case, the Court considered the validity of a ban on indecent "dial-a-porn" communications. As in *Bolger*, the Government argued that *Pacifica* justified a complete ban of that form of speech. The *Sable* Court disagreed, holding instead that *Pacifica*'s "emphatically narrow" holding arose out of the " 'unique' attributes of broadcasting." 492 U.S. at 127. *Sable* narrowed *Pacifica*, implicitly rejecting its nuisance rationale for dial-a-porn and holding that the dial-a-porn law, like the law the Court had struck down in *Butler*, "denied adults their free speech rights by

allowing them to read only what was acceptable for children." *Sable*, 492 U.S. at 126 (citing *Butler v. Michigan*). Thus, any regulation of dial-a-porn would have to give adults the opportunity to partake of that medium. *Id.* *Sable* was cited with approval by Justice Thomas when he stated in *Denver* that "[c]ertainly Congress could not impose a total ban on the transmission of indecent programming." 116 S. Ct. at 2423.

It follows, a fortiori, that a statute that effectively bans newsrack distribution of protected speech violates the First Amendment. Unlike cable broadcasting, the public street is a quintessential public forum, *Frisby v. Schultz*, 485 U.S. 476, 481 (1988), and regulation of speech there is "subject to the highest scrutiny," *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (holding that the city's "sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech," could not "be squared with the dictates of the First Amendment").

The district court found that section 313.1(c)(2) standing alone constitutes a total ban, (App. 26-27), and that the defense provided for in section 313.1(h)(1) is no defense at all, (App. 27). The court of appeals did not suggest that these findings are clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Similarly, the court did not suggest that Petitioners' unchallenged trial evidence, that the defense provided

for in section 313.1(h)(2) was a sham, was untrustworthy.[5] To the extent that the court's statement that the statute "provides two defenses which allow for the retention of the newsracks", (App. 18), implies that the defenses are not illusory, it is contrary to the district court's findings and the record.

Putting aside the question of whether the ban is total, the district court found that the "ultimate effect of the law is to interfere substantially with the ability of adults to buy the newspapers distributed by . . . vending machines," and that the "effect of the . . . law will be to substantially bring the sale of newspapers distributed . . . through vending machines on public thoroughfares throughout California." (App. 27.) Because the statute quarantines adults against publications not too rugged for them in order to shield juvenile innocence, it is in irreconcilable conflict with *Butler* and *Sable*. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988) (implicitly holding that government may not substantially deny adults' access to protected speech, in the name of protecting minors). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *City of Houston v. Hill*, 482 U.S. 451, 458 (1985).

---

[5] When the district court made its findings of fact and conclusions of law granting the preliminary injunction, it found with regard to section 313.1(h)(2) that "there appears to be no feasible way of getting the tokens to an adult wishing to buy the newspapers from a vending machine; that there appears to be no way . . . customers would know how or where they could obtain tokens; and that it appears that customers will not know how tokens . . . will function." (App. 44.)

In *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996) (No. 96-511), Chief Judge Sloviter stated that, in the face of a patent intrusion on a substantial category of protected speech for adults, "there is some irony in considering whether the statute is narrowly tailored or, as sometimes put, whether Congress has used the least restrictive means to achieve a compelling government interest." *See also Shea v. Reno*, 930 F. Supp. 916, 941 (S.D.N.Y. 1996) ("even if it were established that the statute is to some limited extent effective in protecting minors from sexual explicit material . . . and that nothing short of a total ban on indecent communication could be as effective, it is not obvious that the benefits thus achieved would outweigh the burden . . . imposed on the First Amendment rights of adults."), *juris. statement filed*, 65 U.S.L.W. 2095 (U.S. Oct. 15, 1996) (No. 96-595); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) ("[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.").

Whether the statute is viewed as a total ban on newsrack distribution or a substantial denial of the right of adults to protected material, it fails to pass constitutional muster.

4. THE COURTS BELOW COMMITTED CONSTITUTIONAL ERROR IN HOLDING THAT THE FIRST AMENDMENT PERMITS THE BANNING OF NEWSRACK DISTRIBUTION OF PROTECTED SPEECH ON THE THEORY THAT ADULTS MAY OBTAIN THE MATERIAL IN ALTERNATIVE WAYS.

The district court, (App. 33), and the court of appeals, (App. 18), stated that it was permissible to ban newsrack sales because reasonable alternative means of communication, other than newsracks on public streets, exist for Petitioners to distribute their publications. For more than fifty years, however, this Court has made it plain that "one is not to have the exercise of his liberty of expression in appropriate places abridged by the plea that it may be expressed in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

In *Bolger*, the Court rejected the Government's argument that a prohibition on the mailing of contraceptive advertisements does not interfere significantly with free speech because the statute applies only to unsolicited mailings and does not bar other channels of communication. 463 U.S. at 69 n.18. The Court observed that the availability of alternative means of communication is only relevant to analysis of "time, place and manner" restrictions. *Id.* Then-Justice Rehnquist, joined by Justice O'Connor, concurring in the judgment, explained that the Government's argument that the statute is not too broad because Youngs could communicate with the public otherwise than through the mails "fall[s] wide of the mark," since "[a] prohibition on the use of the mails is a significant restriction of First Amendment rights." *Id.* at 79-80.

In *City of Cincinnati*, Justice Stevens observed that Justice Rehnquist's remarks apply equally to newsrack distribution on public streets. Such distribution, he stated, "plays a significant role in the dissemination of protected speech," and the availability of other means of circulation does not minimize the significance of eliminating newsrack distribution. 507 U.S. at 428.

Ignoring the force of these cases, the court of appeals concluded that California met its burden "despite the absence of any evidence in the record to support" the statute. (App. 21.) In *City of Cincinnati*, the Court pointed out that recently there has been a "dramatic growth in the use of newsracks throughout the country," 507 U.S. at 415, that "almost half of the single copy sales of newspapers are now distributed through newsracks," *id.* at 416 n.10, and that a "sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech," could not "be squared with the dictates of the First Amendment," *id.* at 431.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN
Counsel of Record
DAVID GROSZ
BARRY A. FISHER
FLEISHMAN, FISHER & MOEST
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Petitioners

Dated: January 6, 1997

APPENDIX A

Bryan H. CRAWFORD; Jim Atwell, a partnership doing business as Advanced Publications; ISG Communications Inc., a California Corporation; Bold Type, Inc., a California Corporation; Wayne C. Berry, doing business as ZAP Distributors; and Lisa Lascody, Plaintiffs-Appellants,

v.

Daniel E. LUNGREN, Attorney General, individually and as Attorney General of the State of California; James K. Hahn, individually and as City Attorney for the City of Los Angeles; Willie Williams, Chief of Police, individually and as Police Chief for the City of Los Angeles; Gilbert Garcetti, District Attorney, individually and as District Attorney of the County of Los Angeles; Thomas W. Sneddon, District Attorney, individually and as District Attorney for the County of Santa Barbara, Defendants-Appellees.

No. 95-56570.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 11, 1996.

Decided Sept. 11, 1996.

Stanley Fleishman, Fleishman, Fisher & Moest, Los Angeles, California, for the plaintiffs-appellants.

Christopher C. Foley, Deputy Attorney General, Los Angeles, California, for defendant-appellee Daniel E.

Lungren, individually and as Attorney General of the State of California.

Marjorie Heins, ACLU Foundation, New York City, and Cathy E. Crosson, Indiana University School of Law, Bloomington, Indiana, for amici Feminists for Free Expression and Californians Against Censorship Together.

James V. Lacy, Laguna Niguel, California and Gary G. Kreep, Escondido, California, for amici Assemblyman Bill Morrow, the United States Justice Foundation, and Help Oppose Pornography and Exploitation.

Janet M. Larue, Santa Ana, California, for amici National Law Center for Children and Families, "Enough is Enough!" Campaign, National Coalition for the Protection of Children and Families, and Family Research Counsel.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D.C.No. CV-94-08343-MLR.

Before: FERNANDEZ and TASHIMA, Circuit Judges, and MERHIGE,* District Judge.

Opinion by Judge FERNANDEZ; Concurrence by Judge TASHIMA.

FERNANDEZ, Circuit Judge:

---

* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Publishers, vendors, and one consumer of adult-oriented publications appeal the district court's order holding constitutional a California statute that bans the sale of "harmful matter" in unsupervised sidewalk vending machines. They contend that the statute is facially invalid because it discriminates against the sale of certain publications on the basis of content without being narrowing tailored to achieve a compelling state interest. We affirm.

BACKGROUND

On January 1, 1995, California banned the sale of certain "harmful matter" in public vending machines. The statute, California Penal Code section 313.1(c)(2), provides:

> Any person who knowingly displays, sells, or offers to sell in any coin-operated vending machine that is not supervised by an adult and that is located in a public place, other than a public place from which minors are excluded, any harmful matter, as defined in subdivision (a) of Section 313, shall be punished as specified in Section 313.4.

Section 313(a) defines "harmful matter" as:

> matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

The statute also provides certain defenses to the crime described in 313.1(c)(2).[1] Penalties for violating the law are substantial, including a fine of not more than $2000 or imprisonment for as much as one year, or both for the first conviction. Cal.Penal Code § 313.4. Subsequent violations can lead to felony convictions. *Id.*

The constitutionality of the statute was challenged by Bryan Crawford and Jim Atwell, who operate a partnership known as Advanced Publications which produces *The Sun;* ISG Communications, Inc., which produces *New Reality* and *Hollywood Playdates;* Bold Type, Inc., which produces *Spectator;* Wayne Berry, who operates ZAP Distributors, a newsrack company; and Lisa Lascody, who is

---

[1] Those defenses are described in Cal.Penal Code Sec. 313.1(h) as follows:

> It shall be a defense in any prosecution for a violation of paragraph (2) of subdivision (c) that the defendant has taken either of the following measures to restrict access to the harmful matter by persons under 18 years of age:
> (1) Required the person receiving the harmful matter to use an authorized access or identification card to the vending machine after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the card of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen, or used by persons under the age of 18 years or that the card is no longer desired.
> (2) Required the person receiving the harmful matter to use a token in order to utilize the vending machine after taking reasonable measures to ascertain that the person was 18 years of age or older.

a consumer.[2] They requested injunctive and declaratory relief because, they claimed, the statute will likely make it commercially infeasible for the publishers to distribute their materials through vending machines, and the publishers have had great difficulty finding other outlets willing to distribute their materials.[3] Thus, they asserted, the law will ultimately interfere substantially with the ability of adults to purchase the periodicals, and substantially burden the publishers' ability to distribute their materials. That, they said, violates the First Amendment to the United States Constitution.

On December 19, 1994, the district court granted a temporary restraining order against the enforcement of the statute and an order to show cause why a preliminary injunction should not issue. Then, on January 6, 1995, the district court issued a preliminary injunction restraining enforcement of the statute pending trial.[4]

After trial, however, the district court concluded that the statute was not content-based and upheld it as constitutional. In finding the statute to be content-neutral, the court did not provide any explicit explanation, but did

---

[2] They will be collectively referred to as Crawford.

[3] They did not challenge the definition of "harmful matter" in Sec. 313(a) nor did they assert that their publications are not harmful matter. The publications in question do contain a large quantity of highly sexually oriented pictorial and written matter which is not, however, obscene. We will sometimes refer to them as adult-oriented.

[4] Those sued and restrained were Daniel E. Lungren, the Attorney General of the State of California, and a number of officials of local California entities. They are collectively referred to as Lungren.

cite *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Those citations suggest that the court understood the statute to be content-neutral because it concluded that the statute regulated the material on the basis of its secondary effects, rather than on the basis of its impact on the reader. It then held that California had a compelling interest "in shielding minors from the influence of literature that is not obscene by adult standards," and that reasonable alternative means are available for distribution and receipt of the publications. In the alternative, it held that the statute satisfied the constitutional standards applicable to content-based regulations because it was narrowly tailored to serve a compelling state interest. Consequently, the district court dissolved the preliminary injunction and denied the prayer for a permanent injunction. This appeal followed.

JURISDICTION and STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3). We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's ruling on a challenge to the constitutionality of a state statute de novo. *NCAA v. Miller*, 10 F.3d 633, 637 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1543, 128 L.Ed.2d 195 (1994). We also review the decision to grant or deny declaratory relief de novo. *Ablang v. Reno*, 52 F.3d 801, 803 (9th Cir.1995) (" 'Although the decision to grant or deny declaratory relief . . . is a matter initially committed to the discretion

of the district court, on appeal we exercise our own 'sound discretion' to determine the propriety of the district court's grant or denial of declaratory relief.' ") (citation omitted) (quotation omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 701, 133 L.Ed.2d 658 (1996); *see also Tashima v. Administrative Office of the United States Courts*, 967 F.2d 1264, 1273 (9th Cir.1992); *Fireman's Fund Ins. Co. v. Ignacio*, 860 F.2d 353, 354 (9th Cir.1988) (per curiam).

DISCUSSION

I. *First Amendment*

Crawford contends that the statute violates the First Amendment right to free expression because it limits access to a forum based on the content of the message. In assessing the constitutionality of a regulation that limits the time, place, or manner of speech, we must determine whether the statute is content-neutral or content-based. *See Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir.1987). If the statute is content-based, we apply strict scrutiny to determine whether the statute is tailored to "serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991) (quotation omitted). If the statute is content-neutral, we must determine whether it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986).

1. *Content-Based Regulation*

The "principal inquiry" in determining whether a regulation is content-neutral or content-based "is whether the government has adopted [the] regulation- . . . because of [agreement or] disagreement with the message it conveys." *Turner Broadcasting System, Inc. v. FCC*, ___ U.S. ___, ___, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994) (quotation omitted) (second alteration in original). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* That perfectly defines the law at hand because it regulates on the basis of whether the content of a publication will be "harmful" to minors. To determine whether a particular publication is "harmful" under the statute, the state "must necessarily examine the content of the message that is conveyed," predict the "reaction" of young viewers, and make a judgment only on that basis. *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992) (quotations omitted).

That the statute affects publications solely on the basis of content, however, is not quite the end of the inquiry. Some regulations which are seemingly content-based are analyzed as content-neutral regulations if the government shows that they are justified by a desire to eliminate a "secondary effect" – an undesirable effect only indirectly related to the content or communicative impact of the speech. *See City of Renton*, 475 U.S. at 47-49, 106 S.Ct. at 929-30.

The Supreme Court has defined secondary effects as being correlated with, but not directly a consequence of, the impact of the speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) (in the area of sound amplification: "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *see also City of Renton*, 475 U.S. at 48, 106 S.Ct. at 929 (some regulations of businesses that purvey sexually explicit materials are treated as content-neutral because they "are *justified* without reference to the content of the regulated speech"); *cf. Forsyth County*, 505 U.S. at 133-34, 112 S.Ct. at 2403 (regulation based on reaction to speech is not content-neutral). The Court has given examples of legitimate secondary effects, including "prevention of crime, maintenance of property values, and protection of residential neighborhoods." *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988); *see also City of Renton*, 475 U.S. at 50-51, 106 S.Ct. at 930-31; *Young*, 427 U.S. at 71-72, 96 S.Ct. at 2453 (Stevens, J., writing for plurality); *Tollis*, 827 F.2d at 1332.

Section 313.1(c)(2), however, is not designed to remedy potential secondary effects of the "harmful matter." The statute is based only on the State's determination that reading the materials at issue will be "harmful" to minors. The statute, therefore, does not focus on the secondary impact of the speech, but rather on the direct impact of the speech on part of its potential audience. The statute is designed to prevent the materials from provoking harmful reactions in minor readers. That justification

does not fall within the parameters of the secondary effects doctrine. As the Court has explained:

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.

Boos, 485 U.S. at 321, 108 S.Ct. at 1163-64. Like the hypothetical regulation described in *Boos*, section 313.1(c)(2) is concerned with psychological damage to readers and, therefore, "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." *Id.*; *see Berry v. City of Santa Barbara*, 40 Cal.App.4th 1075, 1084, 47 Cal.Rptr.2d 661, 666-67 (1995) (ordinance that distinguishes between publications based solely upon whether they contain material deemed "harmful" to minors is content-based regulation subject to strict scrutiny because its purpose is not to mitigate secondary effects such as traffic congestion or loitering, but to mitigate the perceived effects of the contents of the publications on minor readers); *Sebago, Inc. v. City of Alameda*, 211 Cal.App.3d 1372, 1384, 259 Cal.Rptr. 918, 923 (1989) ("The second aim, that of restricting the access of minors to adult newspapers, concerns direct listener reaction to speech and is thus content-based."); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30, 113 S.Ct.

1505, 1517, 123 L.Ed.2d 99 (1993) (city cannot exclude newsracks just because they dispense commercial speech). Consequently, we must analyze this statute as a content-based regulation, but, as we will demonstrate, the statute survives strict scrutiny.

2. *Strict Scrutiny*

Content-based regulations are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). Nevertheless, a finding that a regulation is content-based does not foreclose the possibility that it is constitutional. *See Simon & Schuster*, 502 U.S. at 116-17, 112 S.Ct. at 508-09. "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989); *see also Simon & Schuster*, 502 U.S. at 118, 112 S.Ct. at 509.

There is no dispute that the aim of the statute is to shield minors from the influence of adult-oriented literature by limiting minors' access to the publications. The Court has recognized that there is "a compelling interest in protecting the physical and psychological well-being of children" and that "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications*, 492 U.S. at 126, 109 S.Ct. at 2836; *see also Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, ___ U.S. ___, ___, 116 S.Ct. 2374, 2391, 135 L.Ed.2d 888 (1996); *New York v.*

Ferber, 458 U.S. 747, 756-58, 102 S.Ct. 3348, 3354-55, 73 L.Ed.2d 1113 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 1280-81, 20 L.Ed.2d 195 (1968). However, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications*, 492 U.S. at 126, 109 S.Ct. at 2837. To pass constitutional muster, content-based restrictions must be the least restrictive alternative available. They must be narrowly tailored to achieve that end. *See Denver Area*, ___ U.S. at ___, 116 S.Ct. at 2391; *Ward*, 491 U.S. at 798 n. 6, 109 S.Ct. at 2758 n. 6 (distinguishing "least restrictive alternative" test of *Boos* from the less strict test for content-neutral regulations); *Boos*, 485 U.S. at 329, 108 S.Ct. at 1168; (a content-based regulation was "not narrowly tailored; a less restrictive alternative is readily available," (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 1850 n. 6, 90 L.Ed.2d 260 (1986) (plurality opinion)).

Crawford asserts that the State has failed to show that the means used were the least restrictive. The resolution of that issue is made somewhat more difficult because, as Crawford points out, the California legislature did not make any specific findings. Crawford suggests that it must. We disagree. Although the courts have been less than pellucid when handling the narrowness issue, they have never said that the legislature must make findings. Findings, or evidence presented at trial, will be helpful and may even be a desideratum. Their absence can make it much more difficult to determine whether a proposed means is, or is not, the least restrictive. But even in the absence of findings or specific evidence, courts can and will rely on common sense, other statutes,

and other cases when it becomes time to consider claims in this area.

We agree that if a plaintiff or the court can imagine and allude to other means, the state has the ultimate burden of showing that the means in question are not effective. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 3069 n. 5, 82 L.Ed.2d 221 (1984) ("[I]t is common to place the burden upon the Government to justify impingements on First Amendment interests. . . . "); *see also 44 Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, ___, 116 S.Ct. 1495, 1509, 134 L.Ed.2d 711 (1996) (in commercial speech area, the state bears the burden of showing that the regulation will advance its interest materially) (Stevens, J., writing for plurality); *Rubin v. Coors Brewing Co.*, ___ U.S. ___, ___, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995) (same); *cf. Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) (in unemployment benefit area, state must justify effect on religious liberty by showing that the means used were the least restrictive). But the courts have allowed discharge of that burden, or found a lack of discharge, in various ways.

In *City of Renton*, for example, the City had not relied upon studies that considered conditions within its borders. However, it had relied upon studies in another city which were summarized in another case. The Supreme Court found that to be sufficient. *See* 475 U.S. at 50-52, 106 S.Ct. at 930-31. And in *Denver Area*, the Supreme Court asked a number of questions testing the breadth of the statute in issue. The Court did not hold that the mere

asking of the questions was enough to overturn the statute, but it did go on to strike the statutory provision because "the answers to the questions are not obvious." ___ U.S. at ___, 116 S.Ct. at 2392. In that same case, the plaintiffs pointed out that a statute regulating a somewhat different area – unleased cable channels rather than leased ones – indicated that less restrictive means were probably available, and nothing in the record before the Court or Congress indicated that they were not. *Id.* at ___-___, 116 S.Ct. at 2392-93. Similarly, in *Sable Communications*, the Court did refer to Congressional findings and found that the findings did not support the statute. 492 U.S. at 129, 109 S.Ct. at 2838. However, the Court noted that the findings did not bind it anyway. *Id.* The Court also pointed out that other studies it had available satisfied it that the means were not the least restrictive. *Id.* at 28-30, 109 S.Ct. at 2838. Justice Scalia added that he agreed, but that this was a value judgment and that "neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote." *Id.* at 133, 109 S.Ct. at 2840 (Scalia, J., concurring). As Justice Scalia suggested, common sense and other materials can lead judges to different conclusions. While legislative findings, evidence, and the like may help, the answers may differ. One need only read the fractionated opinions in *Denver Area* to be assured of that. There may be (nay, there is) a cosmic right answer, but it may be hidden from mere earthlings – even judges.

Of course, when past history and our common sense indicate that some particular exercise of First Amendment rights does not pose any particular danger, or that a

restriction is inappropriate, we have required evidence to demonstrate the contrary. *See, e.g., Wileman Bros. & Elliot, Inc. v. Espy,* 58 F.3d 1367, 1378-79 (9th Cir.1995) (where there was no proof that forced generic advertising was more efficacious than private advertising, the forcing regulation was stricken), *cert. granted,* ___ U.S. ___, 116 S.Ct. 1875, 135 L.Ed.2d 171 (1996); *Cal-Almond, Inc. v. United States Dep't of Agric.,* 14 F.3d 429, 439-40 (9th Cir.1993) (same; also, where we could see no logical justification for certain restrictions and the evidence did not justify them, the regulations fell); *Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1227-28 (9th Cir.1990) (even though least restrictive means not required, we could not see why the restriction in question was needed, so the absence of credible evidence meant that the restrictions must fall).

In the case at hand, the legislation on its face appears to be minimally restrictive if its ends are to be accomplished at all. In fact, it goes to great lengths to spell out ways that will keep children out of the materials in question, while still allowing access to adults. In fashioning the newsrack statute, California balanced the competing interests of protecting children from the harmful effects of consuming adult-oriented newspapers with the interest of adults in having access to those materials. *Cf. Alliance for Community Media v. FCC,* 56 F.3d 105, 124 (D.C.Cir.1995) (en banc), *aff'd in part, rev'd in part, Denver Area,* ___ U.S. at __, 116 S.Ct. at 2398. In order to achieve that balance, California had to mold a statute which would protect against the threat that children, without adult supervision, would purchase harmful materials from unattended newsracks. Yet, it could not preclude

adults from obtaining the materials. The statute is effective in limiting children's exposure and has a narrow focus, which still allows adults to purchase the materials from alternative sources or in alternative ways. It tightly fits the State's compelling interest.

Given the unusually easy availability of materials in these unsupervised newsracks, we find it difficult to see how the State could have fashioned a statute that accomplished its goals while leaving the newsracks themselves untouched. No less burdensome means has been suggested which would still effectuate the goals for which the statute was designed. Crawford suggests the alternatives of placing warning labels on the newsracks, and banning the sale of adult-oriented newspapers within a reasonable distance from schools. Those solutions, however, would not succeed in eliminating or even addressing the State's concern that children will purchase harmful materials from unattended newsracks; there is no reason to think that those solutions would be even marginally effective ways of meeting the State's compelling interest.

Placing warning labels might deter some children, but would certainly not deter (and could even attract) the bulk of them. Although the State presented no evidence to that effect, we hardly think that evidence is required. A person who purchases from a newsrack is perfectly anonymous. It borders on the absurd to say that a youngster would be deterred by an announcement which said something like "[This publication] is highly explicit and is intended for adults over the age of 21 only." As a California Court of Appeal has said in a similar context, "This, of course, assumes . . . that the minor will heed the

warning. We cannot indulge this assumption." *Berry*, 40 Cal.App.4th at 1085, 47 Cal.Rptr.2d at 667.

Geographic restrictions are no more efficacious. Placing newspaper racks away from schools would at best force children to go somewhat out of their way to obtain illicit materials. Indeed, the assumption that children are only to be found around schools or at home is ludicrous in today's society, and it is questionable that it even had much validity in less "sophisticated" times than these. Nor would it help to place the racks in a less frequented area or in an area frequented by those who like adult-oriented materials. Today's children, at least in California, are very mobile. The less frequented the area is, the more anonymous these already very anonymous purchases can become. For a child, who might not want to be seen by another's prying eyes, the publications would become even more attractive if they were away from ordinary neighborhoods and school zones. In that regard, it is interesting to note that the California legislature was aware of an instance where a geographic restriction was attempted by a California city. The city's attempt failed in part because, as a California Court of Appeal said:

> Additionally, the relationship between the ordinance and the asserted governmental interest is so tenuous as to fall short of constitutional sufficiency. . . . The ordinance merely moves the newsracks away from residential areas. Any determined teenager can seek out the relocated newsracks. As Sebago points out, it is just as likely, if not more likely, that a minor will purchase an adult newspaper from a newsrack far away from the watchful eyes of parents and neighbors.

Sebago, 211 Cal.App.3d at 1386, 259 Cal.Rptr. at 925 (citation omitted).

No doubt the legislature relied upon that wise analysis.[5] We do too, but we add one further note. This is not a method of purveyance where only "a few of the most enterprising and disobedient young people" can break through some sophisticated electronic system designed to exclude them. *Cf. Sable Communications*, 492 U.S. at 130, 109 S.Ct. at 2839; *see also Denver Area*, ___ U.S. at ___, 116 S.Ct. at 2393. Any youth with a few coins can access the materials in question.

Moreover, the statute is not prohibitively invasive of any adult's interest in obtaining the materials. The statute provides two defenses which allow for the retention of newsracks; and, although those defenses may impose some economic burden, they do enable the publishers to continue distributing their publications on streets. Also, the publications can be made available through other distributors if the price and salability of the publications make them profitable. *See Denver Area*, ___ U.S. at ___, 116 S.Ct. at 2387 (Breyer, J. writing for plurality). If, as Crawford suggests, merchants do not wish to carry these materials, that is no fault or business of the State. *See id.* at ___, 116 S.Ct. at 2383 (Breyer, J. writing for plurality); *City of Renton*, 475 U.S. at 54, 106 S.Ct. at 932 (the fact that purveyors of materials must "fend for themselves" does

---

[5] No doubt the legislature also recognized that the analysis was suggested by a plaintiff, who wished to have the ordinance stricken. Interestingly enough, plaintiffs in this case raise the geographical issue as a method of striking this legislation, but for the opposite reason.

not raise a First Amendment problem). Furthermore, the parties stipulated that adult-oriented publications of a similar ilk are readily available to adults in libraries and other easily accessed locations.

The harm in question here is obvious, and Crawford points to no other viable method to avoid it. Given Crawford's interest in suggesting other possibilities and the fact that we cannot imagine others ourselves, we are satisfied that the statute is narrowly tailored to protect children without depriving adults.[6]

II. *The Preliminary Injunction*

Lungren argues that the district court erred when it ordered the California Attorney General to immediately notify all district attorneys and sheriffs to obey the preliminary injunction which it had issued. The injunction did not name them, but the court decided that they were

---

[6] Crawford additionally argues that the statute violates the First Amendment because it lacks a requirement that the seller have knowledge that the materials sold are "harmful." However, this ground was not argued to the district court. We decline Crawford's invitation to consider the argument for the first time on appeal. *See International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir.1985) (court will not review issue not raised in district court except in special circumstances such as to prevent manifest injustice). For the same reason, we decline to consider Crawford's equal protection and due process claims. Although the complaint made a passing reference to those claims, the argument is newly minted. The district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal.

required to obey it anyway and that Lungren had authority over them. Lungren asserts that the district court erred because the Attorney General lacked the power to direct local officials to obey the order. We, however, lack the authority to make that determination because the preliminary injunction is no longer in force. We can offer no remedy; the issue is moot. *See American Casualty Co. v. Baker,* 22 F.3d 880, 895-96 (9th Cir.1994) (an appeal is moot if the court cannot fashion any type of effective relief).

CONCLUSION

We came upon this case at the confluence of two streams of concern which flow through our polity – our concern for the protection of our First Amendment freedoms and our concern for the protection of our children. At such a confluence, we expect to hear a roar rather than a purr. So it is here. But although the confluence may be roily, the answers to the issues presented by this case are not wholly obscure.

The State's compelling need to protect children from these publications has been satisfied by the use of a statute which accomplishes the purpose with a precision that protects our First Amendment interests. Neither concern has been sacrificed to the needs of the other. In fine, the statute withstands the attacks made upon it today.

AFFIRMED.

TASHIMA, Circuit Judge, concurring:

I concur in the result and concur generally in the reasoning employed to reach it. I write separately only to add one observation. In the sensitive area of First

Amendment strict scrutiny, contrary to the teaching of all conventional wisdom on the scope of judicial review, judges sometimes are *required* to rely "on their own instinct or experience," *Geary v. Renne*, 911 F.2d 280, 305 (9th Cir.1990) (en banc) (Rymer, J., dissenting), *vacated and remanded*, 501 U.S. 312, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991), in making that strict scrutiny analysis. This is such a case.

As our opinion points out, the law does not require, and this record does not provide, any evidence that less restrictive means are unavailable to meet the perceived problem of newsrack purchases of adult literature by minors. Thus, our judgment that no less restrictive means is available to achieve that compelling interest, despite the absence of any evidence in the record to support that "finding," is truly instinctive and experiential. We acknowledge as much by our references to our own judgment on this score as "common sense" or "a value judgment" or as compelled because "we cannot imagine" otherwise.

I hesitate to add, however, that legislatures should be mindful that they ought not be content always to rely on the instinct and experience of judges to come to the same conclusions as they have in the absence of any legislative record.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRYAN H. CRAWFORD, and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS, et al., Plaintiffs, vs. DANIEL E. LUNGREN, et al., Defendants.	CASE NO. CV94-8343-R JUDGMENT (Filed Oct. 20, 1995)

This action came on for trial before the Court, Honorable Manuel L. Real, District Judge, presiding, and the issues having been duly tried and Findings of Fact and Conclusions of Law having been rendered,

It is Ordered and Adjudged:

1. The prayer for permanent injunction is denied;

2. The preliminary injunction heretofore issued is dissolved 30 days from the date of entry of judgment herein; and

3. California Penal Code § 313.1(c)(2) is declared to violate no provision of the Constitution either on its face or as applied to plaintiffs.

DATED: October 20, 1995.

/s/ Real
MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRYAN H. CRAWFORD, and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS, et al., Plaintiffs, vs. DANIEL E. LUNGREN, et al., Defendants.	CASE NO. CV94-8343-R FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Oct. 20, 1995)

This matter came on regularly for court trial on September 8, 1995. The Court makes the following findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a):

FINDINGS OF FACT

The following matters of fact were stipulated by the parties and based on that stipulation are found by the Court to be true:

(1)(a) Plaintiffs Bryan Crawford and Jim Atwell are partners doing business as Advanced Publications with their principal place of business located at 1614 North Cahuenga Boulevard, in the city and county of Los Angeles. They publish a number of adult newspapers, including *The Sun*, which has been in existence for twenty years. Plaintiff ISG also publishes a number of adult

newspapers, including *New Reality* and *Hollywood Playdates*. Neither Advanced Publications nor ISG owns any vending machines over which they have no control. Virtually all of the sales of these newspapers are through vending machines. The newspapers have negligible retail subscription sales.

(b) Advanced Publications also distributes through adult book stores and liquor stores monthly magazines entitled *Kinky* and *Swinger* which are identical in subject matter to its vending machine publications. *Kinky* and *Swinger* sell for $5.00 a copy. Advanced Publications and ISG's newspaper sell for $1.00 a copy. *Kinky* and *Swinger* have a monthly press run of approximately 900 copies each. Advanced Publications' newspapers have a total monthly press run of approximately 56,000 copies.

(2) Advanced Publications' and ISG's newspapers are designed to be, and are, displayed so that, when they are in the news racks, no photographs or pictorial representations of either sexual organs or the commission of sexual acts are visible. Nor is any "harmful matter" under California Penal Code section 313 visible in the news racks. For the purposes of this lawsuit, it is agreed that none of Advanced Publications' or ISG's newspapers or magazines are obscene as that term has been defined by the United States Supreme Court, but that Defendants contend that all constitute "harmful matter" as that term is defined by California Penal Code section 313.

(3) Plaintiff Bold Type, Inc. is a California corporation with its principal place of business at 5834 Doyle

Street, Suite 103, Emeryville, California. It publishes *Spectator* magazine. *Spectator* is a weekly tabloid news magazine containing news items, book and video reviews, photo feature articles, political and social commentary and advertisements. *Spectator* has been in business continuously since 1978. About half of the papers sold each week are sold through news racks, with the balance through stores and subscriptions. For the purposes of this lawsuit, *Spectator* is not obscene as that term has been defined by the United States Supreme Court, but Defendants contend that it is harmful matter within the meaning of Penal Code section 313. Copies of *Spectator* are designed to be, and are, displayed so that, when they are in the news racks, no photographs or pictorial representations of either sexual organs or the commission of sexual acts are visible. Nor is any "harmful matter" under California Penal Code section 313 visible in the news racks.

(4) Plaintiff Wayne C. Berry, doing business as ZAP Distributors, operates news racks in the city and county of Santa Barbara and other places in California from which he dispenses adult magazines, including but not limited to *The Sun, New Reality, Hollywood Playdates,* and *Spectator* magazine. ZAP has distributed "alternative" or "counter-culture" newspapers through sidewalk news racks for over 17 years. ZAP operates 135 news racks in its distribution area. Per the calculations mentioned above, it would cost ZAP $5,805,000 a year ($43,000 a year x 135 news racks) to supervise its news racks as required by section 313.1(c) (2).

(5) It is likely that California Penal Code section 313.1 as amended will make it difficult for Advanced Publications to continue distributing its publications by

vending machines. It would not be commercially feasible for Advanced Publications or its distributors to place their vending machines under adult supervision.

(6) Vending machines which utilize authorized or identification cards cost more than $900 and are not suitable for street use because of the threat of vandalism.

(7) Despite Advanced Publications' repeated efforts to expand the distribution of the newspapers it presently distributes in vending machines into retail outlets, very few of such outlets are interested in selling those newspapers, and it therefore appears that very few retail outlets would be interested in selling tokens.

After the law was passed, but before it became effective, Plaintiff ZAP sent a letter (of which Exhibit 12 is a representative sample) to each of the liquor stores listed in the Santa Barbara yellow pages inquiring whether they would sell tokens for ZAP's vending machines. No positive response was received. ZAP had earlier experiences in which local liquor stores and magazine stand owners refused to carry the newspapers ZAP distributes in its vending machines.

(8) The ultimate effect of the new law is to interfere substantially with the ability of adults to buy the newspapers distributed by ZAP and published by Advanced Publications, ISG, and Bold Type from vending machines.

(9) The effect of the new law will be to substantially burden the sale of the newspapers distributed by ZAP and published by Advanced Publications, ISG, and Bold Type through vending Machines on public thoroughfares throughout California.

(10) Non-obscene sexually explicit material, or "harmful matter" as that term is defined by California Penal Code section 313.1(c) (2), is freely available in libraries, bookstores, newsstands, music stores, and pay-per-view television.

(11) The distribution of Plaintiffs' newspapers through news racks is presently subject to regulation by (although Plaintiffs do not concede the validity of) laws other than section 313.1(c)(2). They include Penal code section 313.1(d), and other local ordinances. The newspapers in the vending machines do not display to public view sexually explicit material.

(12) The *Financial Times* is a world business newspaper printed week days in London, Frankfurt, Roubaix (France), Jokoping (Sweden), Tokyo, Bellmawr (New Jersey) and Los Angeles. The *Financial Times* sells for $1.50 per copy in the United States. The *Financial Times* which has high brand-name recognition, does not rely primarily on news rack sales, but on subscription and retail sales. The *Financial Times* sells to the public 48 tokens for $29.95. At thirty locations in the San Francisco Bay area, and approximately seventy in Los Angeles and San Diego, the *Financial Times* can be purchased from vending machines using two tokens, which are made of copper and are approximately the size of a U.S. quarter. The machines also accept any combination of coins totaling $1.50. The *Financial Times* sells tokens by mail. The *Financial Times* makes no effort to determine whether people who buy its tokens are minors.

(13) Defendant Daniel E. Lungren is the Attorney General of the State of California and is subject to the

powers and duties of the Governor, the chief law enforcement officer of the State of California. The Attorney General has the duty to see that the laws of the State are uniformly and adequately enforced. Defendant Lungren resides in the State of California and has an office in Los Angeles. If in the opinion of the Attorney General the new law has not been adequately enforced in any county, he will act to ensure that the new law is adequately enforced in that county, unless a court enjoins enforcement and finds that it violates rights secured by the United States Constitution.

(14) Defendant Gilbert Garcetti is the District Attorney for the County of Los Angeles. Defendant Thomas W. Sneddon, Jr. is the District Attorney for the County of Santa Barbara. Defendant Michael D. Bradbury is the District Attorney for the County of Ventura. Defendant James Kenneth Hahn is the City Attorney for the City of Los Angeles. Defendant Willie Williams is the Chief of the Los Angeles Police Department. Defendants, acting within the scope of their respective jurisdictions, have a duty to enforce and will enforce section 313.1(c) (2) against Plaintiffs (other than Lascody) unless a court enjoins enforcement and finds that it violates rights secured by the United States Constitution.

(15) The statement in Plaintiffs' Exhibit 15, ("WARNING: Ordinary Couples/Extraordinary Sex is highly explicit and is intended for adults over the age of 21 only") is a standard statement in advertisements for sexual explicit materials.

The following facts, though not stipulated, are found to be true because admitted without evidentiary objection:

(16) Prior to the enactment of the new law, the Senate Committee on the Judiciary issued a report, a copy of which is Plaintiff's Exhibit 14. The Legislature made no formal official study concerning the extent to which minors purchased adult material from vending machines, nor the harm, if any, to minors flowing from adult publications being sold in vending machines, and the Legislature made no findings justifying the legislation.

Based on the evidence, the Court makes the following additional findings of fact:

(17) Plaintiffs have not shown any ideological, political, or other message that the statute would prevent them from disseminating.

Defendants' Exhibits 1, 2, 3, 4, 5, 6, 10, 11, are representative of publications which Plaintiffs disseminate. Of these eight publications, only two contain at least one page that includes what may be characterized as an article. In these two publications – Exhibit 10, *Hollywood New Reality*, and Exhibit 11, *Hollywood Playdates* – more than 35 pages display solely advertisements. Both of these publications are 43 pages long, and contain similar, if not identical, advertisements.

Plaintiffs' publications are analogous to the "Yellow Pages," in that they predominately show pictorial advertisements and list telephone numbers for particular services. Two basic types of advertisements are contained in these publications. The first solicits, at the very least,

phone sex. The second can be described as personal advertisements, whereby any person having access to these publications can call a number and leave a message, usually at a rate of $2.98 a minute, for a person who has placed an advertisement.

(18) Reasonable alternative means of communication other than news racks exist for Plaintiffs to distribute the publications for which they seek injunctive protection in this lawsuit.

(19) The reasonable alternative means of communication left open to Plaintiffs by the California statute include all means of communication except unattended news racks, and include unattended news racks in places from which minors are excluded.

(20) All of the thousands of newsstands, liquor stores, bookstores. markets, and other retail outlets in California are available to Plaintiffs, unaffected by the statute.

(21) Any unwillingness of retailers to handle Plaintiffs' publications is in no sense attributable to the statute.

(22) Plaintiffs have not proven that they are unable to distribute their publications by means other then news racks.

(23) Plaintiffs have not proven that they would be unable to adapt their news racks to comply with the statute.

(24) Plaintiffs have not proven an interest other than a commercial interest in increased profits from distributing their publications by means of news racks, as opposed to alternative means of distribution.

(25) Unattended news racks expose minors to whatever materials are distributed therein, because anyone with the requisite coins to open an unattended news rack can remove its contents.

(26) Geographical or territorial limitations on the placement of news racks distributing harmful matter would not be effective in preventing minors from being exposed to the publications so distributed.

CONCLUSIONS OF LAW

(1) This Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1342(a)(3). The action is brought pursuant to 42 U.S.C. on the ground that the California statute unconstitutionally burdens and conditions rights protected by the Free Speech, Due Process, and Equal Protection provisions of the Federal Constitution.

(2) The State of California has a compelling interest in shielding minors from the influence of literature that is not obscene by adult standards. *Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968); *New York v. Ferber*, 458 U.S. 747, 756-757 (1982); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 105, 109 S. Ct. 2829, 2836-2837 (1989).

(3) California Penal Code §313.1(c)(2) ("the statute") is a "content-neutral" regulation designed to serve a substantial governmental interest. *Young v. American Mini Theatres*, 427 U.S. 50, 82 n.6, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

(4) Reasonable alternative means of communication are available to Plaintiffs to distribute the publications for which they seek injunctive relief in this action. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, (1986).

(5) Under the analysis applicable to "content-based" regulations, the statute also passes constitutional muster because it is narrowly tailored to serve a compelling state interest. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 105, 109 S. Ct. 2829 (1989).

(6) Lack of a formal or official study or legislative findings by the California Legislature does not tend to invalidate the statute because the governmental interest has been previously recognized in the *Ginsberg, Ferber,* and other decisions, and the purpose of the statute is apparent on its face.

(7) The interest burdened by the statute does not rise above a commercial interest in profits on the part of the distributors and inconvenience on the part of consumers, neither of which is sufficient to outweigh the harm to minors caused by the distribution of statutorily defined harmful matter from unattended news racks.

(8) The interest burdened by the statute does not rise above a commercial interest in profits on the part of the distributors and inconvenience on the part of consumers, neither of which is sufficient to outweigh the harm to society caused by the distribution of statutorily defined harmful matter from unattended news racks, even if the statute causes harmful matter to be distributed from news racks no longer.

(9) Plaintiffs' publications are advertisements and/or offers to provide a service. This proposal for an economic transaction amounts to commercial speech. *See generally Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,* 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980) The fact that some of these publications may contain some social commentary does not mandate a finding that Plaintiffs' publications are not commercial speech. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469, 478, (1983) (stating that advertisements which "link[ ] a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech").

(10) The government has a substantial interest which supports the statute and has demonstrated that the restriction on Plaintiffs' publications directly and materially advances that interest. Moreover, the regulation is narrowly drawn. *Central Hudson,* 447 U.S. 557 (1980); *Florida Bar v. Went For It, Inc.,* 515 U.S. ___, 132 L. Ed. 2d 541, 115 S. Ct. ___ (1995).

(11) Plaintiffs did not bring or maintain this case as a. class action pursuant to Federal Rule of Civil Procedure 23, and, accordingly, this matter did not proceed as a class action.

(12) The statute violates no provision of the Constitution.

DATED: October 20, 1995.

/s/ Real
MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX D

Stanley Fleishman
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067-3275
(310) 557-1077

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BRYAN H. CRAWFORD and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS, et al., Plaintiffs, vs. DANIEL E. LUNGREN, et al., Defendants.	CASE NO. 94-8343R (~~PROPOSED~~) ORDER GRANTING PRELIMINARY INJUNCTION (Filed Jan. 6, 1995)

This matter came on for hearing on January 3, 1995, on the Court's order to show cause why a permanent injunction should not be issued. The Court having considered all papers, evidence, and arguments, and having made its findings of fact and conclusions of law, now makes the following Order:

The defendants, Daniel E. Lungren, James Kenneth Hahn, Chief Willie Williams, Gilbert Garcetti, Thomas W. Sneddon, Jr., and Michael D. Bradbury, and their officers, employees, agents, and all those acting in concert with

them, are hereby enjoined from enforcing California Penal Code section 313.1(c)(2), as amended effective January 1, 1995, pending trial or the further order of the Court.

DATED: JAN -6 1995

MANUEL L. REAL
Judge, United States
District Court

Presented by: /s/ Stanley Fleishman
Stanley Fleishman
Attorneys for Plaintiffs

APPENDIX E

Stanley Fleishman
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067-3275
(310) 557-1077

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BRYAN H. CRAWFORD and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS; ISG COMMUNICATIONS, INC., a California corporation; BOLD TYPE, INC., a California corporation; WAYNE C. BERRY, doing business as ZAP DISTRIBUTORS; and LISA LASCODY, Plaintiffs, vs. DANIEL E. LUNGREN, individually and as Attorney General of the State of California; JAMES KENNETH HAHN, individually and as City Attorney for the City of Los Angeles; CHIEF WILLIE WILLIAMS, individually and as Police Chief for the City of Los Angeles;	CASE NO. 94-8343-R (~~PROPOSED~~) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jan. 6, 1995)

GILBERT GARCETTI, individually and as District Attorney of the County of Los Angeles; THOMAS W. SNEDDON, JR., individually and as District Attorney for the County of Santa Barbara; MICHAEL D. BRADBURY, individually and as District Attorney for the County of Ventura,

Defendants.

On December 19, 1994, the Court granted a temporary restraining order and issued an order to show cause why a permanent injunction should not issue against enforcement of California Penal Code section 313.1, as amended effective January 1, 1995.

The matter came on regularly for hearing on January 3, 1995. Plaintiffs and defendants having appeared through counsel and the Court being fully informed now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. This is an action for injunctive and declaratory relief, brought by Bryan H. Crawford and Jim Atwell, a partnership doing business as Advanced Publications [hereinafter Advanced Publications]; ISG Communications, Inc., a California corporation [hereinafter ISG]; Bold Type, Inc., a California corporation [hereinafter Bold

Type]; Wayne C. Berry doing business as ZAP Distributors [hereinafter ZAP]; and Lisa Lascody, a California citizen, against Daniel E. Lungren, individually and as the attorney general of the state of California; James Kenneth Hahn, individually and as the City Attorney for the City of Los Angeles; Chief Willie Williams, individually and as the police chief for the City of Los Angeles; Thomas W. Sneddon, Jr., individually and as District Attorney of the County of Santa Barbara; Michael D. Bradbury, individually and as District Attorney for the County of Ventura.

2. Effective January 1, 1995, California Penal Code section 313.7(c)(2) provides that any person who knowingly displays, sells or offers to sell in any coin operated vending machine that is not supervised by an adult and that is located in a public place, other than a public place from which minors are excluded, any "harmful matter," as defined by Penal Code section 313, shall suffer the penalties of a misdemeanor for the first offense or a felony thereafter.

3. The new law provides certain "defenses." Section 313.1(h). The first of these requires the *defendant* to show that he or she has restricted access to the harmful matter by requiring

> the person receiving the harmful matter to use an authorized access or identification card to the vending machine after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the card of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen, or

> used by persons under the age of 18 or that the card is no longer desired.

The second defense set forth in section 313.1(h)(2) mandates the *defendant* to require "the person receiving the harmful matter to use a token in order to utilize the vending machine after taking reasonable measures to ascertain that the person was 18 years of age or older."

4. Plaintiffs Bryan Crawford and Jim Atwell are partners doing business as Advanced Publications with their principal place of business located at 1614 North Cahuenga Boulevard, in the city and county of Los Angeles. They publish a number of adult newspapers including *The Sun*, which has been in existence for 20 years. They do not own any vending machines, and distribute virtually all of their publications through vending machines over which they have no control. Without newsstand distribution, it would be impossible to disseminate their publications to their readership.

5. *The Sun* and Advanced Publications' other newspapers are designed to be, and are, displayed so that, when they are in the newsracks, no photographs or pictorial representations of either sexual organs or the commission of sexual acts are visible. Nor is any "harmful matter" under California Penal Code section 313 visible in the newsracks. The publications are non-obscene and they are concededly fully protected by the First Amendment.

6. The distribution of *The Sun* and Advanced Publications' other newspapers is in full compliance with relevant existing law. Advanced Publications complies

with existing Penal Code section 313.1(c), which essentially prohibits newsracks in public places to "display[ ] to the public view" certain kinds of "harmful matter." Existing Penal Code section 313.1(d) permits localities, in the case of "harmful matter" in newsracks, to require "blinder racks" blocking view of the lower two-thirds of the material. Numerous municipalities in California have adopted such laws, and Advanced Publications and its distributors fully comply with them.

7. It is likely that California Penal Code section 313.1 as amended will make it impossible for Advanced Publications to continue publishing constitutionally protected newspapers, including *The Sun*.

The "token" defenses in the new law appear to be a sham. Employing an adult to supervise each vending machine is, on its face, absurd. There appears to be no feasible way that Advanced Publications or its distributors can restrict access by persons under 18 years of age to vending machines by requiring the person receiving the newspaper to use a token in order to utilize the vending machine, nor is there any feasible way of taking reasonable measures to ascertain that the person using the token is 18 years of age or older. Moreover, Advanced Publications and its distributors appears to have no way of restricting access of the adult newspapers by persons under 18 years of age by requiring the person receiving the newspaper to use an authorized access or identification card to the vending machine after taking reasonable measures to ascertain that the applicant was 18 years of age or of establishing a procedure to immediately cancel the card of any person after receiving notice, in writing or by telephone, that the card has been lost, stolen or used

by persons under the age of 18 years of age or that the card is no longer desired.

8. If Advanced Publications cannot distribute its newspapers through vending machines, it is likely that it will have to cease publication altogether. Despite Advanced Publications' repeated efforts to expand its distribution into retail stores and develop additional venues, its distribution is limited to vending machines. Advanced Publications has offered its publications to thousands of stores and newsstands over the years but very few bookstores and retail outlets are interested in selling its publications and therefore could not in any way constitute an alternative to the newsrack vending machines. Newsracks remain Advanced Publications' sole means of distribution. Advanced Publications' extensive efforts to expand its distribution have all been in vain.

9. The ultimate effect of the new law is likely to take away the right of adults to buy Advanced Publications newspapers through vending machines, and to deny Advanced Publications the opportunity to publish and distribute its constitutionally protected newspapers through vending machines.

10. Plaintiff Bold Type, Inc., is a California corporation with its principle [sic] place of business at 5834 Doyle Street, Suite 103, Emeryville, California. It publishes *Spectator* magazine. The overwhelming majority of magazines are sold through vending machines, some of which are owned by Bold Type and some of which are owned by others.

11. The *Spectator* is a weekly tabloid news magazine containing news items, book and video reviews, photo feature articles, political and social commentary and advertisements. The *Spectator* has been in business continuously since 1978. About half of the papers sold each week are sold through newsracks, with the balance through stores and subscriptions. No one claims that the contents of the publication are obscene, although some persons believe it is "harmful" for minors.

12. The distribution of the *Spectator* through newsracks is presently in full compliance with all relevant laws. The newspapers in the vending machines do not display to public view photographs or pictorial representations of the commission of sexual acts or photographs or pictorial representations of sexual organs. Nothing viewable from the street is "adult" in nature, or is "harmful matter" as defined by California Penal Code section 313.

13. The *Spectator* maintains about 200 vending machines on public rights-of-way. Revenue from Bold Type's newsracks averages about $8.00 to $12.00 a week, for each rack. For each rack to be supervised by an adult, 24 hours a day, would cost $120 a day (assuming pay of $5.00 an hour including taxes) or $43,800 a year. Thus, to supervise the 200 racks Bold Type services would cost the *Spectator* $8,760,000 a year.

14. Neither of the so-called defenses in the new law appear to be economically feasible. To attempt to demonstrate that Bold Type has restricted access to its publications by requiring the person receiving the material to use an authorized access or identification card to the

vending machines would require Bold Type to dispose of the racks it now uses (which cost about $200 each), and use a vending machine that could be equipped to accept a card (which costs about $900). Thus, Bold Type would have to scrap machines worth about $40,000, and invest about $180,000 to replace them. This "defense" is not feasible. Moreover, there appears to be no feasible way of getting cards to adults to work the machines and there is no known procedure to immediately cancel the card after receiving the notice set forth in section 313.1(h)(1). Finally, the cost of any such card and monitoring it is prohibitive, given that the *Spectator* sells for $1.25 a copy.

15. The second defense set forth in section 313.1(h)(2) mandates the *defendant* to require "the person receiving the harmful matter to use a token in order to utilize the vending machine after taking reasonable measures to ascertain that the person was 18 years of age or older." Putting aside for the moment the burden and cost of adapting the vending machines to a token, there appears to be no feasible way of getting the tokens to an adult wishing to buy the newspaper from a vending machine. Moreover, there appears to be no way Bold Type customers would know how or where they could obtain tokens or cards to purchase the *Spectator* at controlled vending machines. Furthermore, it appears that customers will not know how tokens or cards will function when such tokens or cards will be necessary for more than one publication.

16. Over the years Bold Type has sought diligently to get stores – liquor stores, corner markets, and the like – to carry their publication. For the most part, Bold Type has been unsuccessful in finding stores that are willing to

carry a newspaper that has only a $1.25 cover price and a limited market: the profit margin for them is negligible. If they won't sell Bold Type's publication, it appears that they would not sell their token. Without being able to sell Bold Type's publication through vending machines, it is unlikely that the *Spectator* could survive.

17. It appears that The [sic] effect of the new law will be to prohibit, throughout California, the sale of the *Spectator* through vending machines on public thoroughfares.

18. Plaintiff Wayne C. Berry, doing business as ZAP Distributors, operates newsracks in the city of Santa Barbara from which he dispenses adult magazines, including but not limited to *The Sun, New Reality, Hollywood Playdates,* and *Spectator* magazine.

19. ZAP has distributed "alternative" or "counterculture" newspapers through sidewalk newsracks for over 17 years. ZAP operates 135 newsracks in its distribution area.

20. The newspaper ZAP distributes do not, in the vending machines, display to public view photographs or pictorial representations of the commission of sexual acts or of sexual organs, and do not display to public view any "harmful matter" as defined by California Penal Code section 313. In portions of the newspapers not displayed to public view in newsracks, the newspapers typically contain erotic stories, photographs and advertisements published for an adult readership. The newspapers ZAP distributes are not obscene and are fully protected by the First Amendment, but they will be subject to the new law.

21. Although not required by law, each one of ZAP's newsracks displays a warning sticker that the newspaper contained within is for sale to adults only. The stickers are similar in appearance to the warning signs used on cigarette vending machines.

22. It appears that none of the token defenses provided in the new law are commercially feasible as applied to ZAP's newsrack distribution business. Requiring a 24 hour newsrack attendant is commercially impracticable, since each of ZAP's newsracks produces on the average between $2.75 and $3.50 in gross sales per week. To place a 24-hour adult attendant at each newsrack location would cost, at minimum wage, some $714.00 per week. The "identification card" defense also appears to be not feasible. Kaspar Wire Works, Inc. is the exclusive manufacturer of this type of newsrack. The sales price for each debit card reader newsrack is $912.50 and each debit card costs $4.00. Only a few such newsracks have been sold within the United States, and because of the monetary value of the newsrack as well as the sensitive nature of the card reading device, placement is recommended only in secured public areas such as airport waiting rooms. Moreover, this type of newsrack does not comply with Santa Barbara Municipal Code section 5.66.050 (general restrictions on placement and appearance). Section 5.66.050 requires that newsracks "shall be similar in appearance to the predominant style of newsracks" in the city. The "high-tech" newsracks do not meet this requirement. Finally, ZAP would be forced to charge its newspaper buyers a $4.00 surcharge over and above the $1 selling price of its newspapers in order to recover the cost

of each debit card provided. This will discourage virtually all potential readers from buying the publications.

23. While it is possible to convert ZAP's existing newsracks to accept tokens, it appears to be next to impossible to find any retailers who will participate in a token distribution program.

24. Non-obscene sexually explicit material appears to be freely available to minors in libraries, bookstores, newsstands, music stores and on television, particularly pay television. Video recordings of "harmful matter," under new California Penal Code section 313.1(e), only need be placed in an area labeled "adults only." There is no requirement for an adult to monitor access to the so-called adult area, and the penalty for infraction is a mere $100.00. The penalty imposed, however, for a violation of the newsrack regulation may be up to one year's imprisonment in the county jail and a fine of $2,000, or both, for the first offense. A second or further offense is punishable by state prison. Effectively banning the sale of sexual material through vending machines while permitting the exposure of minors to sexual material that is allegedly harmful to minors in libraries, record stores and the like is irrational and denies Advanced Publications and other similarly situated persons to the equal protection of the laws.

25. It appears that the new law is not the lease restrictive method to shield minors from "harmful matter" distributed through newsracks.

26. Defendant Daniel E. Lungren is the Attorney General of the State of California. He is, subject to the

powers and duties of the Governor, the chief law enforcement of the State of California. He has the duty to see that the laws of the State are uniformly and adequately enforced, and has direct supervision of all law enforcement officers designated by law. Directly and through his officers and agents Defendant Lungren enforces, supervises, and administers the laws of the State of California, including new Penal Code section 313.1(c)(2). Defendant Lungren resides in the State of California and may be found within this District and Division. Unless restrained by court order, Lungren will enforce the new law against the plaintiff publishers and distributor. Similarly, defendants James Kenneth Hahn, Chief Willie Williams, Gilbert Garcetti, Thomas W. Sneddon, Jr. and Michael D. Bradbury will enforce the new law against plaintiffs within their respective jurisdictions.

27. Any conclusions of law that are in actuality findings of fact shall be deemed incorporated herein by reference.

CONCLUSIONS OF LAW.

1. This Court has original jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). The action is brought pursuant to 42 U.S.C. § 1983 on the ground that the statute unconstitutionally burdens and conditions rights protected by the Free Speech, Due Process, and Equal Protection provisions of the Federal Constitution. The new statute would likely effectively ban from newsracks in California publications fully protected by the First Amendment and substantially impede the distribution of such publications. It is a content-based regulation

on the exercise of Free Speech enacted without an apparent demonstrated compelling state interest. Moreover, it appears that other, less restrictive methods exist to achieve California's articulated goal.

2. It is conceded by all that the newspapers published and distributed by defendants are not obscene and the publications therefore are fully protected by the First Amendment. *United States v. United States Dist. Court (Kantor)*, 858 F.2d 534, 542 (9th Cir. 1988); *J-R Distribs. v. Eikenberry*, 725 F.2d 487, 489 (9th Cir. 1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcardes, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). *See generally United States v. X-Citement Video, Inc.*, 63 U.S.L.W. 4019, 4021 (U.S. Nov. 29, 1994) ("[N]on-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment.").

3. The First Amendment to the Constitution of the United States provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . " This prohibition is made applicable to state action by the Due Process Clause of the Fourteenth Amendment. The California Constitution, article I, section 2(a) likewise provides, in part: "A law may not restrain or abridge liberty of speech or press." The protection afforded the press applies whether a newspaper is sold or given away (*Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385 (1973)), and encompasses circulation and distribution as well as publication. (*Lovell v. Griffin*, 303 U.S. 444, 452 (1938).)

The guarantees provided in the First Amendment mean "government has no power to restrict expression

because of its message, its ideas, its subject matter, or its content." (*Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).) The government may regulate the time, place and manner of speech (*Schneider v. State*, 308 U.S. 147, 162 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 302 (1940)), but time, place and manner regulations may not be based upon either the content or the subject matter of speech. (*Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-536 (1980).) Thus, when a time, place and manner regulation is found to be facially content-based, the government has the burden of proving the restriction is justified without reference to the content of the regulated speech. (*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).) Because the new law is content-based, it is presumptively unconstitutional. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2458, 129 L. Ed. 2d 497 (1994); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542, 120 L. Ed. 2d 305 (1992).

4. First Amendment protections are applicable to the "public distribution of newspapers and periodicals through newsracks." *Kash Enters. v. City of Los Angeles*, 19 Cal. 3d 294, 301, 562 P.2d 1302, 1306, 138 Cal. Rptr. 53, 57 (1977). *See Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 992 F.2d 154, 158 (4th Cir. 1993) (collecting cases). " 'Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.' " *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 768, 108 S. Ct. 2138, 2150, 100 L. Ed. 2d 771 (1988) (quoting *Ex parte Jackson*, 96 U.S. 727, 733, 24 L. Ed. 877 (1878)). Newsracks are effective and important means of distribution. *See id.* at 762, 108 S. Ct. at 2146.

5. The statute regulates speech in public streets and ways, a quintessential public forum, *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S. Ct. 2495, 2500, 101 L. Ed. 2d 420 (1988), and is, therefore, "subject to the highest scrutiny." *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2706, 120 L. Ed. 2d 541 (1992). In this forum, "the government's authority to restrict speech is at its minimum." *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1951, 118 L. Ed. 2d 555 (1992).

6. The new statute is not a time, place and manner restriction since it is content-based. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516, 123 L. Ed. 2d 99 (1993).

7. California may not effectively prevent adults from purchasing protected material in order to prevent minors from purchasing the same material. *Sable*, 492 U.S. at 126-27, 109 S. Ct. at 2837. *See also Bolger v. Young's Drug Prods. Corp.*, 463 U.S. 60, 74, 103 S. Ct. 2875, 2884, 77 L. Ed. 2d 469 (1983) ("The level of discourse reaching a mail box simply cannot be limited to that which would be suitable for a sand box."). As in *Butler v. Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957), this statute "is to burn the house to roast the pig." *Id.* at 383, 77 S. Ct. at 525. Moreover, government may not regulate protected speech at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from the limitations. *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984).

8. The United States Supreme Court, on equal protection grounds, has invalidated regulations that singled out some elements contributing to an alleged harm, but not others. *See, e.g., Police Dep't v. Mosley*, 408 U.S. 92, 94-95, 92 S. Ct. 2286, 2289, 33 L. Ed. 2d 212 (1975); *Carey v. Brown*, 447 U.S. 455, 460, 110 S. Ct. 2286, 2290, 65 L. Ed. 2d 263 (1980); *City of Cincinnati v. Discovery Network Inc.*, 113 S. Ct. 1505, 1509, 123 L. Ed. 2d 99 (1993); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 769, 98 S. Ct. 1407, 1412, 55 L. Ed. 2d 707 (1978). The new law appears to be underinclusive, because it impermissibly singles out adult material distributed by newsracks, while leaving similar adult material distributed through other methods unsupervised.

9. It is likely that California Penal Code section 313.1 is facially invalid because it restricts the distribution of protected speech based on the content of that speech; because California has failed to establish that the new law achieves a compelling government interest and achieves such an interest by the least restrictive means; and because the "defenses" set out in section 313.1(h) appear to be a sham.

10. This is a proper case to issue a preliminary injunction since it is highly likely that plaintiffs will prevail on the merits and the balance of equities tilt sharply in plaintiffs' favor.

Because of the serious First Amendment issues this case raises, and the fact that a great deal of protected speech will be effectively prohibited if the law is enforced, the status quo should be preserved pending trial or the further order of the Court. There is no reason to allow the machinery of the criminal process to fall

upon Plaintiffs or to accede to a significant diminution of speech until the case is heard. *See, e.g., American Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316, 1329 (S.D. Ind. 1984) (anti-pornography ordinance stayed before going into effect and then held unconstitutional), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001, 106 S. Ct. 1172, 89 L. Ed. 2d 291 (1986). "[W]hen a court is faced with determining issues with First Amendment implications, there exists the likelihood of irreparable harm such that maintaining the status quo while the court resolves the constitutional claims is desirable." *Empire News, Inc. v. Soloman*, 818 F. Supp. 307, 309 (D. Nev. 1993).

Let a preliminary injunction issue enjoining the defendants Daniel E. Lungren, James Kenneth Hahn, Chief Willie Williams, Gilbert Garcetti, Thomas W. Sneddon, Jr. and Michael D. Bradbury, and their agents, servants, employees and all others engaging in concert with them from enforcing California Penal section 313.1(c)(2) as amended effective January 1, 1985, pending trial or the further Order of the Court.

DATED: JAN. 6 1995

MANUEL L. REAL
Manuel L. Real, Judge
United States District Court

Presented by:
/s/ Stanley Fleishman
Stanley Fleishman
Attorney for Plaintiffs

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRYAN H. CRAWFORD; JIM ATWELL, a partnership doing business as Advanced Publications; ISG COMMUNICATIONS, INC., a California corporation,

Plaintiffs-Appellants,

v.

DANIEL E. LUNGREN, Attorney General, individually and as Attorney General of the State of California; JAMES KENNETH HAHN, individually and as City Attorney for the City of Los Angeles; WILLIE WILLIAMS, Chief of Police, individually and as Police Chief for the City of Los Angeles; GILBERT GARCETTI, District Attorney, individually and as District Attorney of the County of Los Angeles; THOMAS W. SNEDDON, individually and as District Attorney for the County of Santa Barbara,

Defendants-Appellees

No. 95-56570

D.C. No. CV-94-08343-MLR

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

(Filed Nov. 29, 1996)

Before: FERNANDEZ and TASHIMA, Circuit Judges, and MERHIGE, District Judge.*

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

---

* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX G

CALIFORNIA PENAL CODE, PART 1,
TITLE 9, CHAPTER 7.6 (excerpts)

§ 313. Definitions. As used in this chapter:

(a) "Harmful matter" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value for minors.

(b) "Matter" means any book, magazine, newspaper, video recording, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles,

equipment, machines, or materials. "Matter" also includes live or recorded telephone messages when transmitted, disseminated, or distributed as part of a commercial transaction.

(c) "Person" means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

§ 313.1.

* * * *

(c)(1) Any person who knowingly displays, sells, or offers to sell in any coin-operated or slug-operated vending machine or mechanically or electronically controlled vending machine that is located in a public place, other than a public place from which minors are excluded, any harmful matter displaying to the public view photographs or pictorial representations of the commission of any of the following acts shall be punished as specified in Section 313.4: sodomy, oral copulation, sexual intercourse, masturbation, bestiality, or a photograph of an exposed penis in an erect and turgid state.

* * * *

(d) Nothing in this section invalidates or prohibits the adoption of an ordinance by a city, county, or city and county that restricts the display of material that is harmful to minors, as defined in this chapter, in a public place, other than a public place from which minors are excluded, by requiring the placement of devices commonly known as blinder racks in front of the material, so that the lower two-thirds of the material is not exposed to view.

* * * *

(h) It shall be a defense in any prosecution for a violation of paragraph (2) of subdivision (c) that the defendant has taken either of the following measures to restrict access to the harmful matter by persons under 18 years of age:

(1) Required the person receiving the harmful matter to use an authorized access or identification card to the vending machine after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the card of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen, or used by persons under the age of 18 years or that the card is no longer desired.

(2) Required the person receiving the harmful matter to use a token in order to utilize the vending machine after taking reasonable measures to ascertain that the person was 18 years of age or older.

* * * *

§ 313.4. Punishment. Every person who violates Section 313.1, other than subdivision (e), is punishable by fine of

not more than two thousand dollars ($2,000), by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment. However, if the person has been previously convicted of a violation of Section 313.1, other than subdivision (e), or of any section of Chapter 7.5 (commencing with Section 311) of Title 9 of Part 1 of this code, the person shall be punished by imprisonment in the state prison.

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRYAN H. CRAWFORD; JIM ATWELL, a partnership doing business as Advanced Publications; ISG COMMUNICATIONS, INC., a California corporation,

Plaintiffs-Appellants,

v.

DANIEL E. LUNGREN, Attorney General, individually and as Attorney General of the State of California; JAMES K. HAHN, individually and as City Attorney for the City of Los Angeles; WILLIE WILLIAMS, Chief of Police, individually and as Police Chief for the City of Los Angeles; GILBERT GARCETTI, District Attorney, individually and as District Attorney of the County of Los Angeles; THOMAS W. SNEDDON, individually and as District Attorney for the County of Santa Barbara,

Defendants-Appellees

No. 95-56570

D.C. No. CV-94-08343-MLR

ORDER GRANTING MOTION FOR STAY OF ISSUANCE OF THE MANDATE PENDING APPLICATION OF WRIT OF CERTIORARI

(Filed Dec. 18, 1996)

Before: FERNANDEZ, Circuit Judge.

Appellants' motion for stay of the issuance of the mandate pending application for a writ of certiorari is granted.

Therefore, it is ordered that the issuance of the mandate shall be stayed to and including January 6, 1997, and if during that period there is filed with the Clerk of this court a notice from the Clerk of the Supreme Court that appellants have filed a petition for writ of certiorari in that Court, the stay shall continue until final disposition by the Supreme Court.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRYAN H. CRAWFORD, et al., Plaintiffs-Appellants, vs. DANIEL E. LUNGREN, Attorney General, et al., Defendants-Appellees.	No. 95-56570 DC# CV-94-8343-MLR Central California ORDER (Filed Nov. 21, 1995)

Before: NORRIS and REINHARDT, Circuit Judges

Appellants' emergency motion for a stay of the district court's October 20, 1995 order pending appeal is granted. *See Hilton v. Braunskill*, 481 U.S. 770, 778 (1987).

The current briefing schedule shall remain in effect.

APPENDIX J

Crawford v. Lungren, No. 95-56570

PARTIAL TRANSCRIPT OF
ORAL ARGUMENT OF DEPUTY ATTORNEY
GENERAL FOLEY

July 11, 1996 Hearing – 9:00 a.m., Courtroom 1
Panel: Fernandez, Tashima, Circuit Judges;
Merhige, District Judge

COURT: What about the argument that there is no indication that kids give a darn about this junk.

FOLEY: It is not the purchase of the materials by children is the evil that is being addressed. The evil that is being addressed by this statute is the exposure of children to it. The making available to them of these materials which the U.S. Supreme Court almost 30 years ago said that the state does have a compelling interest in preventing minors from being exposed to these materials.

* * *

COURT: Okay. But, if they're in a vending machine and the youngsters could purchase it, but let's say just for fun that no youngster has ever or ever would purchase this, because it's sort of a waste of a dollar or whatever it costs, then their only exposure is that the material is there. Correct?

FOLEY: If they choose not to take advantage of the fact that it is exposed?

COURT: We are stipulating that harmful material is not exposed. We know that. That's part of your stipulation, as I recall. The harmful material is inside the paper. On the outside of the paper is maybe a girl in a bathing

suit or something like that. But, inside the paper is the harmful material. So the children aren't exposed to the harmful material in the rack. But I understand your position is they are exposed simply because they could conceivably buy it. Is that right?

FOLEY: Ah, yes. That is correct. They are exposed to the . . . The evil that the statute is addressing is the fact that a child, if the child wishes to, may purchase the materials from an unattended newsrack.

COURT: Now, is that an evil that no child has ever done so or if you had a strange sociological study that it's never been done and it's the kind of thing a child wouldn't do.

FOLEY: The statute is . . . Yes. The short answer to your question is yes. And, the . . .

COURT: I'm sorry. So that I don't miss it – yes, there has been a study?

FOLEY: No. It is correct that the California legislature did not make a study as to the number . . .

COURT: But did they make any study at all?

FOLEY: No, they did not make study at all in support of this statute. The statute is based on the . . . The plaintiffs in this case would have us believe that the effective way – or an effective way – to deal with this problem would be to put on the outside of the newsrack a sticker saying something to the effect: "Warning. Ordinary couples/extraordinary sex is highly explicit and is intended for adults over the age of 21 only." Now, that is . . .

* * *

COURT: But, we really don't know. That's just me speaking as a father and a grandfather. We don't know whether they would not without a study. That's what bothers me. I cannot understand . . . It's like having a – I don't know how many members of the legislature you have – it's like having all grandfathers. Because I don't like that junk around my children or other children. But, I don't want the First Amendment stepped upon either.

FOLEY: No and . . .

COURT: This is pretty casual but people like me say, "and oh, yeah, it would be dangerous for children."

FOLEY: In response, all I can say is there's no doubt in my mind what the 14 year old boy, what his reaction would be to the opportunity to purchase that material which is described as highly explicit and intended for adults. I don't think it needs any study. And, I don't know what type of a study would be expected to come up with some valid conclusion.

COURT: Well, you spend 86 million dollars, I think they said that's what it would cost, and you have a state agent stationed for a year at each one of those newsracks counting how many kids come by to pick it up. There is a study for you. And then you find out that no child ever comes by to pick that stuff up. Right? And the state agent is dressed like bum so they're not put off it's not a police officer. Okay. So you do this study and you find out that no kid ever comes by to pick it up. Then would the legislature still . . . should or could it still ban it?

FOLEY: Well, that is a hypothetical that I'm unable to address.

COURT: Well, why not. It's the polar position of the problem. I'm not throwing it at you just to make your life hard – or I guess maybe I am – just to make your life hard. But the point . . . What I'm really saying is let's sweep that aside and just say in the California cosmos of this court we know that no child has ever bought it. There's something genetic in California kids that they just won't buy that stuff. Okay, now let's say we know that. Would the statute still be okay?

FOLEY: If you are binding me to that premise . . .

COURT: I am. You're not giving up anything. You're just bound to my premise. And if that is my premise, then is the statute okay?

FOLEY: Yes it is. And the reason is that it is not the actual purchase, it is the exposure. California does not wish to depend on the good will or the moral training or the genetics of the children, it is trying to protect.

COURT: Okay. It's the possibility of purchase you're saying then. And if only 10 kids out of 20,000 buy it, that's good enough, for example you would say. Right? Or are tempted to buy it.

FOLEY: Yes. Because I've already conceded if none of them buy them then surely I must concede that if only 10 buy it. It is . . .

COURT: And the reason is the temptation. The possibility.

FOLEY: The exposure – yes.

COURT: Okay.

FOLEY: Yes. And, ah . . .

COURT: Ah, just one – what do you mean by exposure? The fact that you can see the cover of the newspaper. What do you mean?

* * *

COURT: Maybe I should ask my question a little differently. What is the compelling state interest that's being advanced by the statute?

FOLEY: The compelling state interest recognized by the Ginsberg court in Ginsberg versus New York, protection of children from the psychological harm associated with materials that are harmful or indecent.

COURT: And the psychological harm comes from what, looking at the newsrack?

FOLEY: No. The psychological harm would come from the actual purchase and digesting of the material.

COURT: If so, then don't you have to make some showing that they're actually purchased at the newsracks by minors if that's the harm?

FOLEY: No. Again, it is the exposure, it is making it available, it is giving them the opportunity . . .

COURT: You just said the compelling interest is the psychological harm that comes from the purchase.

FOLEY: Excuse me?

COURT: You said the compelling interest is the psychological harm that comes from the purchase.

FOLEY: Well, it is correct that if they purchase the materials and never looked at it, no psychological harm. I can't dispute that.

COURT: Alright, so then don't you have to show that, you know, that minors purchase from newsracks.

FOLEY: No . . .

COURT: How else can there be a compelling state interest if there is no purchase?

FOLEY: Because the compelling state interest . . . What California statute is intended to do is to take the decision away from the child.

COURT: So the compelling state interest is to protect the minor from making a decision of whether to purchase or not?

FOLEY: Yes.